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Disclosing Corporate Disclosure Policies

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DISCLOSING CORPORATE DISCLOSURE POLICIES

VICTORIA SCHWARTZ*

ABSTRACT

Between Steve Jobs' diagnosis of pancreatic cancer in 2003 and his death in 2011, Apple struggled to respect the privacy of its CEO while disclosing relevant information to its shareholders. The existing rules that govern corporate disclosure were of little help. They offer no mechanism for taking into account privacy considerations; nor do they provide any clear guidance regarding whether, when, and under what circumstances a corporation must disclose personal information about its executives. Existing privacy laws also fail to comprehensively address this problem. This legal void has created widespread uncertainty for executives, corporations, and shareholders. Scholars have also struggled to identify solutions that appropriately account for both privacy and disclosure. Their attempts have been hindered by the difficulty of estimating the respective values of disclosure to investors and of privacy to executives, especially to the extent that the value of privacy varies widely across individuals and depends on the type of personal information.

This Article offers one solution for accounting for this privacy-disclosure problem. First, corporations and executives should contract for a disclosure policy that takes into consideration the individual executive's privacy preferences. The corporation should then be required to disclose the contracted-for disclosure policy to its shareholders. The use of a contractual menu approach would allow for the possibility of executives' heterogeneous privacy preferences, while minimizing transaction and other costs of traditional default rules. At the same time, disclosure of the policy allows shareholders to indirectly exert influence on the corporation's negotiations. In addition, the creation and disclosure of the disclosure policy increases certainty for all the parties involved.

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I. INTRODUCTION

When Apple CEO Steve Jobs was diagnosed with pancreatic cancer in 2003, after much agonizing, Apple's board decided to say nothing to its shareholders.¹ And as Jobs' health deteriorated, Apple continued to cite Jobs' need for privacy, and offered little to no information about his condition.² By contrast, when Warren Buffett underwent colon surgery in 2000, Berkshire Hathaway provided a detailed press release before the surgery informing shareholders that Buffett expected to have the surgery and the circumstances that led to the surgery.³

These salient health examples are not unique. Torn between respecting executive privacy and meeting obligations to shareholders, corporations lack guidance for whether and under what circumstances they should disclose personal information about their executives to their shareholders.⁴ And commentators, practitioners, and scholars continue to debate the doctrinal and positive question of when disclosure is required under the existing legal system.⁵

1. Cory Franklin, *Does a CEO Deserve Privacy?*, CHI. TRIB. (Oct. 27, 2011), http://articles.chicagotribune.com/2011-10-27/news/ct-perspec-1027-ceo-20111027_1_apple-shareholders-apple-board-apple-stock; Joe Nocera, *Apple's Culture of Secrecy*, N.Y. TIMES (July 26, 2008), <http://www.nytimes.com/2008/07/26/business/26nocera.html?sq=&st=nyt&scp=170&pagewanted=all>.

2. Nocera, *supra* note 1.

3. See ALICE SCHROEDER, *THE SNOWBALL: WARREN BUFFETT AND THE BUSINESS OF LIFE* 700-01 (2008).

4. See *infra* Part II.B.

5. Joan MacLeod Heminway, *Personal Facts About Executive Officers: A Proposal for Tailored Disclosures to Encourage Reasonable Investor Behavior*, 42 WAKE FOREST L. REV. 749, 752-59 (2007) ("[T]he gap-filling rules may require public disclosure of executives' personal facts." Under the antifraud rules "a court may find that it is substantially likely that a reasonable investor would consider certain personal facts important in making an investment decision relating to the corporation's securities. . . . [or] as a significant alteration of the total mix of available information." (emphasis added)); Alexis Brown Stokes, *An Apple a Day Keeps Shareholder Suits at Bay: An Examination of a Corporate Officer's Legal Duty to Disclose Health Problems to Shareholders*, 17 TEX. WESLEYAN L. REV. 303, 310 (2011) (recognizing that there is "uncertainty over whether and when an executive's medical condition is 'material' to the company"); Chris Dolmetsch & Peter Burrows, *Apple May Not Need to Disclosure Details of Jobs Medical Leave, Lawyers Say*, BLOOMBERG (Jan. 18, 2011), <http://www.bloomberg.com/news/2011-01-18/apple-s-disclosure-of-steve-jobs-medical-leave-is-sufficient-lawyers-say.html>; Nocera, *supra* note 1.

This Article addresses the related prescriptive question of when a corporation *should* be required to disclose personal information about its executives to its shareholders in light of a privacy-disclosure problem—conflicting interests in executive privacy and shareholder disclosure pulling in opposing policy directions. This privacy-disclosure problem exists at the intersection of two Brandeisian-inspired legal ideas. Louis Brandeis and Samuel Warren’s 1890 article “The Right to Privacy,” arguing for legal recognition of a right to privacy,⁶ is widely considered the founding architecture for privacy law and scholarship.⁷ At the same time, Brandeis’ famous quotation that “[p]ublicity is justly commended as a remedy for social and industrial diseases” and that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman,”⁸ is commonly recognized in the corporate disclosure literature as part of the founding legal theory for the value of disclosure, which influenced thinking about corporate disclosure regimes.⁹

The privacy-disclosure problem occurs as the result of a tension between two sets of competing interests. On the one hand, shareholders have a legitimate interest in disclosure of personal information about an executive that either impacts the ability of the executive to currently perform his or her duties, or is likely to impact the executive’s ability to perform his or her duties in the future. On the other hand, executives have a legitimate privacy interest in their personal information. Additionally, evidence suggests that individual privacy preferences are heterogeneous.¹⁰ The resulting difficulty in determining the strengths, valuations, and distribution of privacy preferences makes developing a solution that correctly accounts for the competing privacy and disclosure interests particularly challenging.

6. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

7. See, e.g., James H. Barron, *Warren and Brandeis, The Right to Privacy*, 4 *Harv. L. Rev.* 193 (1890): *Demystifying a Landmark Citation*, 13 SUFFOLK U. L. REV. 875, 877 (1979) (noting the “near unanimity among courts and commentators that the Warren-Brandeis conceptualization created the structural and jurisprudential foundation of the tort of invasion of privacy”); Irwin R. Kramer, *The Birth of Privacy Law: A Century Since Warren and Brandeis*, 39 CATH. U. L. REV. 703, 704 (1990).

8. LOUIS D. BRANDEIS, *OTHER PEOPLE’S MONEY AND HOW THE BANKERS USE IT* 92 (1914).

9. See, e.g., Cynthia A. Williams, *The Securities and Exchange Commission and Corporate Social Transparency*, 112 HARV. L. REV. 1197, 1212-15 (1999) (describing Brandeis’ role as an “advocate of disclosure” and his influence on the players involved in writing the Securities Act).

10. See Il-Horn Hann et al., *The Value of Online Information Privacy: An Empirical Investigation* 3 (Oct. 2003) (unpublished manuscript), available at <http://regulation2point0.org/wp-content/uploads/downloads/2010/04/php2b.pdf>; Alan F. Westin, “Whatever Works”: *The American Public’s Attitudes Toward Regulation and Self-Regulation on Consumer Privacy Issues*, NAT’L TELECOMM. & INFO. ADMIN., <http://www.ntia.doc.gov/page/chapter-1-theory-markets-and-privacy> (last visited May 14, 2013); *infra* Part II.A.

Furthermore, the privacy-disclosure problem extends beyond the disclosure of health information context, although that is the situation that often arises in the news and therefore in the public consciousness. Analogous problems involving tensions between privacy and disclosure may be triggered by various types of personal information—including a messy divorce, extramarital affairs, legal difficulties, addictions, and various problems with a child—all of which may impact the executive's performance in some manner.

This Article offers one possible solution for addressing the privacy-disclosure problem.¹¹ Under this proposal, individual corporations would contract with their high-level executives to determine the privacy disclosure policy that would apply to that executive's personal information in light of that executive's privacy preferences. The corporation would then be required to disclose that negotiated disclosure policy to its shareholders. By harnessing market forces, this solution accounts for the differences in individual privacy preferences, while providing a mechanism to respect both sets of competing interests. This solution allows executives to negotiate a disclosure policy that matches their personal privacy preferences. At the same time, the disclosure of that negotiated disclosure policy would still provide additional decisionmaking information to shareholders to use in their investment decisions.

The Article develops these ideas in four parts. Part II offers a theoretical account of the competing interests at stake in the problem building upon both the existing privacy and disclosure literatures. It then addresses the evidence suggesting the existence of heterogeneous privacy preferences and the additional challenges such heterogeneity creates. Part II also identifies the insufficiencies of existing legal regimes in dealing with these competing interests and the resulting real world uncertainty in the corporate world. Part III introduces the details of the proposed solution and explains the benefits of using a contract menu approach. Part IV considers the applicability of the

11. Others have previously discussed this privacy-disclosure problem in different contexts. See Patricia Sánchez Abril & Ann M. Olazábal, *The Celebrity CEO: Corporate Disclosure at the Intersection of Privacy and Securities Law*, 46 HOUS. L. REV. 1545, 1581-96 (2010) (discussing disclosure obligations under SEC regulations and federal antifraud laws); Heminway, *supra* note 5, at 789-802 (2007) (recommending reforms relating to disclosure of personal information about executives); Allan Horwich, *When the Corporate Luminary Becomes Seriously Ill: When Is a Corporation Obligated to Disclose That Illness and Should the Securities and Exchange Commission Adopt a Rule Requiring Disclosure?*, 5 N.Y.U. J.L. & BUS. 827, 833-62 (2009) (addressing primarily the descriptive question of what the law currently requires); Tom C.W. Lin, *Executive Trade Secrets*, 87 NOTRE DAME L. REV. 911, 951-70 (2012) [hereinafter Lin, *Executive*] (proposing importing the trade secret regime as a useful theoretical framework for treatment of executive disclosures); Tom C.W. Lin, *Undressing the CEO: Disclosing Private, Material Matters of Public Company Executives*, 11 U. PA. J. BUS. L. 383, 409-16 (2009) [hereinafter Lin, *Undressing the CEO*] (offering a model for disclosure of private executive information).

proposed solution to other areas of the law including consumer privacy and the disclosure of information about politicians and candidates for office, and explains how examining those contexts reinforces that this solution is specifically tailored to the particular problem of corporate executives. Part V concludes.

II. TENSION BETWEEN PRIVACY AND DISCLOSURE

In deciding whether corporations should have to disclose personal information about corporate executives to the corporation's shareholders, policymakers must account for privacy and disclosure interests pulling in competing directions. The shareholder interests pull in the direction of more disclosure, whereas the executive privacy interests pull in the direction of less. This section builds on the existing corporate disclosure and privacy literatures to identify these competing interests and explain why they are triggered in the context of this particular problem. It then turns to a discussion of the legal status quo, with regard to both the corporate disclosure rules and various privacy laws, in order to explain the shortcomings of this patchwork of laws for thinking about the problem. The status quo neither accounts for both sets of competing interests nor for the added difficulty posed by evidence of heterogeneity in privacy preferences. Consequently, executives, shareholders, and corporations all currently operate within a regime of uncertainty.

A. *The Disclosure Interest*

The securities regulatory regime in the United States is unquestionably a disclosure regime. Furthermore, it seems fair to assume that the existing overall disclosure regime is likely to remain intact for the foreseeable future. Nonetheless, in order to better appreciate the specific disclosure interest in the disclosure of personal executive information, it is helpful to briefly describe the rationales for the overall disclosure system, while recognizing the long-lasting debate regarding the overall merits of such a regime. Only then is it possible to identify the theory under which there is a legitimate interest in the disclosure of personal information about executives. To be clear, the question at this point in the analysis is whether there is an interest in, or a value to, disclosure itself. This is distinct from the question of whether disclosure makes sense as a policy; that question involves both the consideration of costs and benefits of a disclosure policy as well as comparisons to alternative policy options.

The legal, economic, accounting, and finance literatures addressing disclosure have not identified a single comprehensive theory of

disclosure.¹² Although they draw lines in different ways, scholars defending the existing system of corporate disclosure have identified its underlying rationale as some combination of intersecting justifications: (1) preventing financial manipulation/fraud because “sunlight is said to be the best of disinfectants”; (2) providing investors with enough information to enable them to arrive at their own rational decisions; (3) fairness/equality: allowing all investors, big and small, insiders and outsiders, equal access to relevant information; (4) restoring the confidence of investors in the stock market; and (5) causing stock prices to better reflect underlying firm value and therefore enhance market accuracy.¹³ At the same time, critics have challenged these justifications on numerous theoretical¹⁴ and empirical grounds.¹⁵

12. See, e.g., Robert E. Verrecchia, *Essays on Disclosure*, 32 J. ACCT. & ECON. 97, 98 (2001).

13. I draw these lines slightly different from others, but draw upon their categories. See Joel Seligman, *The Historical Need for a Mandatory Corporate Disclosure System*, 9 J. CORP. L. 1, 9 (1983) (describing the benefits of mandatory disclosure as (1) preventing issuers from concealing or misrepresenting information material to investment decisions; (2) preventing underwriting costs and insiders’ salaries and perquisites from becoming excessive; (3) increasing “public confidence” in the markets; (4) supplementing suboptimal disclosure under state law and private associations; and (5) supplementing suboptimal disclosure under civil and criminal actions); see also Geoffrey A. Manne, *The Hydraulic Theory of Disclosure Regulation and Other Costs of Disclosure*, 58 ALA. L. REV. 473, 479-80, 480 n.25 (2007) (offering three categories and suggesting that Seligman’s categories can be collapsed into his three: (1) investors will make better investment decisions; (2) stock prices will better reflect underlying firm value thereby enhancing market accuracy; and (3) fraud will be deterred).

14. See, e.g., Frank H. Easterbrook & Daniel R. Fischel, *Mandatory Disclosure and the Protection of Investors*, 70 VA. L. REV. 669, 692-96 (1984); Edmund W. Kitch, *The Theory and Practice of Securities Disclosure*, 61 BROOK. L. REV. 763, 770-72 (1995).

15. In 1964, George Stigler provided the first systematic criticism of corporate disclosure requirements. George J. Stigler, *Public Regulation of the Securities Market*, 37 J. BUS. 117 (1964). Among his many arguments, Stigler attempted to empirically determine whether investors in new stock issues had benefitted from mandatory disclosure requirements. See *id.* at 120. Stigler concluded that the mandatory disclosure requirements “had no important effect on the quality of new securities sold to the public.” *Id.* at 124.

Almost immediately, Irwin Friend and Edward Herman challenged the accuracy of Stigler’s data, as well as the conclusions he had drawn from his findings. See Irwin Friend & Edward S. Herman, *The S.E.C. Through a Glass Darkly*, 37 J. BUS. 382 (1964). Friend and Herman found that correcting for these deficiencies confirmed the superiority of post-S.E.C. performance. See *id.* at 391-99. This led to another round of exchanges between Stigler and his critics. See George J. Stigler, *Comment*, 37 J. BUS. 414 (1964) (defending his conclusions, while acknowledging errors in the original data); Irwin Friend & Edward S. Herman, *Professor Stigler on Securities Regulation: A Further Comment*, 38 J. BUS. 106 (1965) (claiming that even with Stigler’s revisions, the evidence still strongly favors superior new issue performance in the post-S.E.C. period).

A decade later, George Benston advanced three arguments for concluding that mandatory disclosure was unnecessary: (1) a historical critique: he found little evidence of fraud or misrepresentation prior to 1933; (2) a necessity critique: corporate voluntary disclosures prior to 1934 provided investors with adequate material financial information to make informed investment decisions; and (3) an empirical critique based on tests demonstrating that the corporate disclosures compelled by the SEC were neither timely nor material to investors. George J. Benston, *Required Disclosure and the Stock Market: An Evaluation of the Securities Exchange Act of 1934*, 63 AM. ECON. REV. 132 (1973). Like Stigler’s, Benston’s studies and the conclusions he drew from them have drawn extensive criticisms.

Relatedly, theoretical economic models suggest that investors value disclosure requirements because such disclosure causes managers to better prioritize maximizing shareholder value, and some empirical evidence supports this conclusion.¹⁶ The evidence from empirical and theoretical attempts to demonstrate or disprove the effectiveness of disclosure remains mixed,¹⁷ and a clear answer remains elusive.¹⁸

Despite this uncertainty, consistent with the majority view as well as with the existing disclosure regime, this Article assumes that there is some value to shareholders from the disclosure of certain types of relevant information. At the most basic level, shareholders value the disclosure of relevant information because shareholders always want to be able to sell their stock for the highest price possible.¹⁹ Their ability to command the highest possible price relies on a flow of believable information from the corporation, which prevents potential buyers from reducing their bid prices because they assume the worst.²⁰ Shareholders want positive information to be disclosed in order to raise the stock price directly. Shareholders want negative information to be disclosed in order to increase the believability of the flow of information, and because without the disclosure of bad information, buyers may assume that silence is evidence of catastrophic information, thus reducing the share price.

See, e.g., Irwin Friend & Randolph Westerfield, *Required Disclosure and the Stock Market: Comment*, 65 AM. ECON. REV. 467, 467-68 (1975) (noting that the conclusions Benston “draws from his analysis seem faulty”); Seligman, *supra* note 13, at 14-18 (criticizing Benston’s historical critique as being based on an incomplete search of the literature; his voluntary disclosure argument as based on an incomplete sample and failing to support his overall conclusions; his empirical critique as based on a faulty tests, which have been heavily criticized for both study design and interpretation of results; and all of his critiques as objectionable because they ignore historical evidence supporting disclosure).

16. See Michael Greenstone, Paul Oyer & Annette Vissing-Jorgensen, *Mandated Disclosure, Stock Returns, and the 1964 Securities Acts Amendments*, 2006 Q. J. ECON. 399, 403.

17. See, e.g., Greenstone, Oyer & Vissing-Jorgensen, *supra* note 16, at 446-47 (finding evidence that investors valued the additional disclosure requirements in the 1964 Securities Acts Amendments); Gregg A. Jarrell, *The Economic Effects of Federal Regulation of the Market for New Security Issues*, 24 J.L. & ECON. 613, 624-50 (1981); Rafael La Porta et al., *What Works in Securities Laws?*, 61 J. FIN. 1, 27-28 (2006) (concluding that mandatory disclosure rules improve stock market performance); Carol J. Simon, *The Effect of the 1933 Securities Act on Investor Information and the Performance of New Issues*, 79 AM. ECON. REV. 295, 313 (1989) (finding a benefit from mandatory disclosure on unseasoned, non-NYSE-traded firms, but not seasoned NYSE-traded firms). See also Easterbrook & Fischel, *supra* note 14, at 672 (concluding that “neither the supporters nor the opponents of the fraud and disclosure rules have made a very good case.”).

18. Jonathan R. Macey, *Efficient Capital Markets, Corporate Disclosure, and Enron*, 89 CORNELL L. REV. 394, 411-12 (2004) (noting that existing “empirical economic studies provide no more than weak support for mandatory disclosure” and that “the case for mandatory disclosure remains indeterminate”); See Manne, *supra* note 13, at 474 n.3 (pointing out that “evidence of the efficacy of mandatory disclosure is also ambiguous”).

19. Easterbrook & Fischel, *supra* note 14, at 684.

20. *Id.*

Therefore, the key question is why personal information about executives constitutes the sort of relevant information whose disclosure shareholders value. Some scholars have attempted to minimize the legitimacy of the interest in personal information about executives as an example of celebrity-fascination, and therefore not something that society or lawmakers should prioritize.²¹ While celebrity-fascination may be a portion of the picture, other under-theorized explanations exist for why shareholders might want to know personal information about executives.

First, shareholders might legitimately care about personal information regarding executives, which provides some insight into the ability of the executive to do his or her job. This category may be divided into concerns about an executive's ability to currently perform the job, and concerns about the executive's ability to stay on the job.

In the first scenario, shareholders might care about personal information that in some way may impact the ability of the executive to do his or her job. In this scenario, the personal fact is not signaling to the shareholder that the executive will leave the current role, but rather that the executive's effectiveness in that role is impacted perhaps because the personal fact represents some sort of distraction or other inability to devote the executive's typical time, energy, or focus to the company. This scrutiny of the ability of the executive to do his or her job does not rely on an assumption that the executive single-handedly affects corporate performance.²² The executive is not strictly speaking "indispensable," and there is probably, as others have argued, an overly exaggerated cult of the CEO.²³ It is not, however, necessary for the executive to single-handedly affect corporate performance for information about the executive to be relevant to the shareholder, because it can impact the executive's performance and therefore the performance of the company.

Various personal facts about the executive might trigger this concern about the executive's ability to perform his or her job. For example, an executive who is in the middle of a nasty divorce might find the divorce to be a significant distraction from his or her duties. Similarly, non-terminal health issues might impact the ability of an executive to do his or her job, even if shy of requiring the executive to actually leave the job. For example, a particular health issue may cause time away from the job because of time required to attend doctor appointments or to deal with treatment. Alternatively, various health issues may involve symptoms that impact job performance, such as severe headaches, physical weakness, or various mental health issues.

21. Abril & Olazábal, *supra* note 11, at 1547-50.

22. *But see id.* at 1602-03 (identifying this as a fallacy by those who believe that corporate information can impact the company).

23. *See id.*

In some situations, such as the death of a family member, empirical evidence exists that is at least consistent with this distraction theory. For example, finance scholars at NYU's Stern School of Business found that on average the profitability of a company, as measured by operating return on assets, fell by roughly 2.4 percentage points in the two years after the death of a CEO's child than in the two previous years.²⁴ There was also a drop in the company's return on assets after the death of a CEO's parent²⁵ (although no statistically significant change after the death of a mother-in-law).²⁶

The second scenario involves personal information that shareholders would consider relevant because it provides some insight regarding the executive's ability to retain the job. A few versions of this theory are plausible. First, shareholders may believe that a particular executive is especially good at his or her job, and there is a concern about losing that executive because the successor may not be equally effective. Second, regardless of what shareholders believe about a particular executive, there may be a belief that transitions are necessarily hard on a company, so the very fact of an upcoming transition is relevant to the shareholder. This theory is consistent with the prominence of developing corporate succession plans within the corporate governance literature.²⁷ Finally, shareholders may believe that a particular executive is subpar, but due to various capture and other issues, that the board is unlikely to remove that executive. In that final scenario, shareholders would look at the personal information that suggests that the executive is likely to leave his or her position as a positive input.

This theory does not rely on an assumption that a publicly traded company is "likely to become extinguished or suffer irreparable long-term harm if its corporate figurehead dies or falls in infamy."²⁸ In actuality, very little of what a corporation does single-handedly affects corporate performance, or causes the company to become extinguished or suffer irreparable harm. Instead, corporate performance is a complex result of numerous relevant factors, and the ability of the executive to stay on the job constitutes one such relevant factor.

24. Morten Bennedsenol, Francisco Pérez-González & Daniel Wolfenzon, *Do CEOs Matter?* 15 (Dec. 2010) (unpublished manuscript) (on file with the Columbia Business School), available at <http://www1.gsb.columbia.edu/mygsb/faculty/research/pubfiles/3177/valueceos.pdf> (using data from Denmark).

25. *Id.* at 19.

26. *Id.* at 4.

27. See, e.g., Tom C.W. Lin, *The Corporate Governance of Iconic Executives*, 87 NOTRE DAME L. REV. 351, 379-80 (2011) (pointing out the importance of succession plans to a company's stability and success); Stokes, *supra* note 5, at 323 (arguing that good corporate governance principles would require every public company to develop a clear succession plan).

28. Abril & Olazábal, *supra* note 11, at 1604 (suggesting that this is a second fallacy of the belief that executive information can impact company performance).

A number of personal facts could impact the executive's ability to stay on the job, and therefore be relevant under this theory. The most obvious example is a serious or even terminal illness as was the case with Steve Jobs. Other examples include criminal legal problems (putting aside those directly related to the corporation), especially those that can result in jail time and the resulting loss of the services of the executive. Some empirical evidence supports this theory that the company's performance can be impacted by the loss of an executive as well.²⁹

In addition to personal information revealing something about the ability of the executive to do or stay in his or her job, shareholders might also care about executive personal facts based on a belief that the facts reveal information about the executive's integrity or values. Just as others have argued that information about a corporation's social impact contains value given the existence of social investors who are concerned with the social and environmental effects of corporate conduct,³⁰ similarly, investors might rationally be concerned with personal information revealing something about an executive's integrity or values that is of concern to some shareholders. The information that falls within this category bears close resemblance to the sort of information the public has found relevant with regard to politicians and includes things like extramarital affairs.

Some scholars criticize this theory of disclosure by pointing out that this information is at best anecdotal evidence of the executive's integrity and "may have no bearing at all."³¹ Certainly any information that has "no bearing at all" on either ability or integrity/value of the executive has no disclosure interest. The remaining personal information, however, even if merely anecdotal, remains relevant, and the only question is a matter of degree. Although the anecdotal nature of the evidence might suggest that "formal disclosure of such information might on balance be more harmful than beneficial to investors,"³² that conclusion skips ahead to the next step of the analysis where costs and benefits are balanced. Again, at this point the question is not whether all such information ought to be disclosed, but rather whether there is a theory under which investors benefit from such disclosure.

Some personal facts may fall into more than one theory of disclosure. For example, whereas information about an executive's unlawful activities may be relevant because the executive may go to jail, or

29. Jesus M. Salas, *Entrenchment, Governance, and the Stock Price Reaction to Sudden Executive Deaths*, 34 J. BANKING & FIN. 656, 657 (2010) (reviewing the executive deaths literature that has found negative reactions to sudden executive deaths).

30. See Williams, *supra* note 9, at 1273-88, 1293-96.

31. Abril & Olazábal, *supra* note 11, at 1600.

32. *Id.*

be distracted from his or her duties, the same information might also be relevant because it tells shareholders something about that executive's values or integrity. Other personal facts may not fall into any theory of beneficial disclosure. For those facts, the privacy-disclosure problem set out by this Article does not apply, as there is no legitimate disclosure interest in conflict with the executive's privacy interest.

Although most of the media publicity has involved executives who have achieved a certain level of personal fame, the same theories identified for why shareholders would care about executives' personal information apply to senior level executives who are less notorious. Although certainly not every corporate executive is as vital to a company as Steve Jobs or Warren Buffett, the difference is one of degree rather than of kind. The salaries commanded by senior level executives³³ suggest that corporations and shareholders believe that they are valuable to the company and accordingly that their performances matter. Hence it is logical that distractions from that performance would also matter. In fact, it may be the case that executives at publicly traded companies that are smaller may matter even more, because in the smaller companies the executive holds more specific knowledge about all aspects of the company's performance.

B. *The Privacy Interest*

In addition to the typical costs recognized in the corporate literature as inherent whenever there is disclosure, the question of whether to disclose the personal information of executives requires consideration of an additional cost—namely interference with the executives' privacy interests. This section addresses privacy *interests* as a potential cost of a disclosure policy, or something to be considered as a competing consideration against the disclosure *interest* discussed above. This section does not have in mind a legal privacy *right*, which would inherently prevent disclosure.³⁴ The normative and policy problem considered in this Article is triggered not only when disclosure impinges upon legal privacy rights, but also whenever disclosure requires impinging upon a privacy interest, regardless of whether

33. See Daniel J. Morrissey, *Executive Compensation and Income Inequality*, 4 WM. & MARY BUS. L. REV. 1, 13-16 (2013) (describing and lamenting the rise of executive compensation); David I. Walker, *Who Bears the Cost of Excessive Executive Compensation (And Other Corporate Agency Costs)*, 57 VILL. L. REV. 653, 658-61 (2012) (providing various statistics for the high levels of executive pay).

34. See Ferdinand Schoeman, *Privacy: Philosophical Dimensions of the Literature*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY 1, 3-4 (Ferdinand David Schoeman ed., 1984) (recognizing that the issue of loss of privacy should be disentangled from the question of infringement upon a right to privacy).

that interest has already been legally recognized as a constitutional, statutory, or common law privacy right.³⁵

1. *Accounts of the Value of Privacy*

Just as scholars have not reached a consensus account of the value of disclosure, similarly there are numerous accounts of the value of privacy. Overall, traditional privacy scholarship across disciplines identified two main clusters of explanations for why privacy is important and valuable to society:³⁶ (1) “privacy is a key component in the more general regard for human dignity,” which includes appeals to “such conditions as moral integrity, individuality consciousness of oneself as a being with moral character and worth, and consciousness of oneself as a being with a point of view, searching for meaning in life”; and (2) privacy is essential to interpersonal relationships, which includes an “understanding of ourselves as social beings with varying kinds of relationships, each in its way important to a meaningful life.”³⁷ Additionally, the developing economics of privacy literature addresses the value of privacy with regard to economic terms.

One reason for taking into account the privacy of executives is that there is a relationship between respect for privacy and respect for individual dignity more generally. Warren and Brandeis’ famous 1890 article “The Right to Privacy” contains early hints of this idea.³⁸ Warren and Brandeis defended the importance of protecting privacy in reference to other values already deemed worth protecting, such as the individual’s right to be left alone and the respect due an individual’s inviolate personality.³⁹ They suggested that these values relate to a person’s self-estimate and others’ estimates of that person’s feel-

35. By contrast, other scholars have focused on a conflict with privacy rights rather than interests. See Heminway, *supra* note 5, at 771-72 (criticizing the existing disclosure regime for creating tension with the *right* to privacy); Lin, *Undressing the CEO*, *supra* note 11, at 423-25 (dismissing concerns about individual privacy rights); Stokes, *supra* note 5, at 311-13 (examining the right to privacy rather than an interest in privacy).

36. While this discussion of privacy is necessarily rooted in American culture and society, scholars have argued that privacy is a more universal value. For example, in “The Origins of Modern Claims to Privacy,” Alan Westin concluded that although the specific forms it may take may differ, privacy appears to be a cultural value across all human societies. ALAN F. WESTIN, *PRIVACY AND FREEDOM* 12-13 (1967). Similarly, Robert Murphy argues in his essay “Social Distance and the Veil” that privacy is recognized and institutionalized in all societies, and is essential to the maintenance of both social relationships and the sense of self. Robert F. Murphy, *Social Distance and the Veil*, in *PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY*, *supra* note 34, at 34-35 (arguing that the modern understanding of the private realm originated in classical Greek times as those aspects of life activities that people shared with lesser beings, not as those necessary for the flourishing of uniquely human activities).

37. Schoeman, *supra* note 34, at 8 (classifying the various value of privacy literature as fundamentally falling into these two categories).

38. See Warren & Brandeis, *supra* note 6, at 196.

39. *Id.* at 205-07.

ings. By their account, society and the law ought to recognize the moral and spiritual integrity of individuals.⁴⁰

Subsequently, Edward Bloustein expanded upon the idea of inviolate personality introduced by Warren and Brandeis as central to the role of privacy.⁴¹ Bloustein included other values such as individual dignity and integrity, personal uniqueness, and personal autonomy,⁴² and argued that it is respect for these values, which underlies giving individuals the right to determine to whom their thoughts, emotions, sentiments, and tangible products are communicated. Bloustein argued that privacy is essential to an individual's uniqueness, autonomy, and sense of moral personality.⁴³ Similarly, Stanley Benn argued that something basic to the notion of respect for persons underlies society's desire to respect a person's choice to act in private.⁴⁴ Benn suggested that society's privacy ideals are tightly linked to ideals about life and character.⁴⁵ Finally, Jeffrey Reiman defended privacy in terms of individualistic moral considerations, as "a social ritual by means of which an individual's moral title to his own existence is conferred."⁴⁶ In this view, privacy is an essential part of a social practice by which a society communicates to the individual that this existence is rightfully his or her own.⁴⁷ Without such a practice, Reiman theorized that a person's very sense of self as something morally distinctive could not develop.⁴⁸ Included in Reiman's vision of moral autonomy and personhood is the ability to determine what about our thoughts and body is experienced by others.⁴⁹

A second reason to take into account the privacy preferences of executives is that privacy plays a role in assisting individuals to maintain interpersonal relationships that are the key to a functioning society. Charles Fried explained that the fundamental capacity to form important, intimate relationships of love, friendship, and trust requires the ability to choose when to relinquish aspects of one's inner self to another.⁵⁰

40. Other scholars disagreed and contended that the interest in privacy can be reduced to reputation, emotional tranquility, and proprietary gain, rather than something unique to privacy. See Frederick Davis, *What Do We Mean by "Right to Privacy"?*, 4 S.D. L. REV. 1, 7-12 (1959); William L. Prosser, *Privacy*, 48 CALIF. L. REV. 383, 406-07 (1960).

41. Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser*, 39 N.Y.U. L. REV. 962 (1964).

42. *Id.* at 1002-03.

43. *Id.*

44. Stanley I. Benn, *Privacy, Freedom, and Respect for Persons*, in PHILOSOPHICAL DIMENSIONS OF PRIVACY: AN ANTHOLOGY, *supra* note 34, at 223, 231-32.

45. *Id.* at 235-43.

46. Jeffrey H. Reiman, *Privacy, Intimacy, and Personhood*, 6 PHIL. & PUB. AFF. 26, 39 (1975).

47. *Id.* at 39, 43.

48. *Id.* at 39.

49. *Id.* at 42.

50. Charles Fried, *Privacy*, 77 YALE L.J. 475, 480 (1968).

Fried's theory of privacy formed the foundation for other interpersonal relationship-based views of privacy.⁵¹ James Rachels generalized Fried's position, noting that not only can privacy be the way to privilege intimate relationships, but privacy is also central to a person's ability to maintain varying kinds of relationships regardless of intimacy.⁵² Similarly, Robert Gerstein argued that intimacy could not occur without privacy.⁵³ Gerstein explained that intimate relationships require parties to behave as what he called "participants," which requires a sense of abandon that is not possible absent privacy.⁵⁴ Privacy is also essential to provide individuals with the ability to form independent judgments about social norms.⁵⁵ As part of an otherwise diverse account of privacy, Ruth Gavison noted that privacy allows for important interactions among people with different points of view without the need to address areas of disagreement.⁵⁶ Privacy allows individuals the emotional and intellectual space to thoughtfully consider troubling ideas without social pressure.⁵⁷

As a multi-disciplinary issue, until this point the discussion of privacy has been in the language of values and philosophical, sociological, and psychological interests. While these interests are conceptually legitimate, when the opposing interest is economic, such as the shareholder interest in the disclosure of information, it can be difficult to know how to compare these far more amorphous discussions of privacy interests. For this reason, the economics of privacy literature can add a useful addition to consider the tradeoffs required in policies addressing privacy.⁵⁸

Led by Richard Posner, early economic treatments of privacy in the late 1970s to early 1980s questioned the value of privacy and contended that markets for personal information would work adequately without any regulation.⁵⁹ Concerned with overregulation in attempting to protect privacy, this early literature attacked privacy as not social wealth maximizing. For example, Posner argued that privacy

51. See Schoeman, *supra* note 34, at 22.

52. *Id.* at 24.

53. *Id.* at 23.

54. Robert S. Gerstein, *Intimacy and Privacy*, 89 ETHICS 76, 77 (1978).

55. Robert S. Gerstein, *California's Constitutional Right to Privacy: The Development of the Protection of Private Life*, 9 HASTINGS CONST. L.Q. 385, 422 (1982).

56. Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 455-56 (1980).

57. *Id.* at 443.

58. See generally Kai-Lung Hui & I.P.L. Png, *The Economics of Privacy*, in ECONOMICS AND INFORMATION SYSTEMS 471 (Terrence Hendershott ed., 2006) (providing a useful review of the economics of privacy literature).

59. *Id.* at 473; Jack Hirshleifer, *Privacy: Its Origin, Function, and Future*, 9 J. LEGAL STUD. 649, 658, 663-64 (1980); Richard A. Posner, *An Economic Theory of Privacy*, REGULATION, May-June 1978, at 19, 26; Richard A. Posner, *Privacy, Secrecy, and Reputation*, 28 BUFF. L. REV. 1, 1-7 (1979); Richard A. Posner, *The Economics of Privacy*, 71 AM. ECON. REV. 405, 408 (1981); George J. Stigler, *An Introduction to Privacy in Economics and Politics*, 9 J. LEGAL STUD. 623, 640 (1980).

is best understood not as a legitimate interest in its own right, but rather as an “intermediate good.”⁶⁰ Posner viewed the interest in privacy as motivated by a socially suboptimal desire to hide either “information concerning past or present criminal activity, or moral conduct at variance with the individual’s professed moral standards,” or information that would “correct misapprehensions that the individual is trying to exploit.”⁶¹ Under this conception of privacy, any government regulation supporting privacy would be inherently inefficient.

After a long silence, scholars returned to consider this vision of privacy in the second half of the 1990s and early 2000s. Much of this scholarship came to the defense of privacy, both rejecting Posner’s narrow understanding of the benefits of privacy as well as pointing out that “there are dynamic benefits to privacy beyond the ‘taste’ for privacy that an individual may have.”⁶² For example, Richard Murphy noted that “manipulating reputation is not the only reason people desire privacy,” and that other “psychic values count” in the “utility calculus” in determining when limiting disclosure of information is appropriate.⁶³ Similarly, Paul Schwartz argued that a strong economic argument can be made in favor of privacy, and that the narrow view of social utility “ignores the positive economic role that data privacy plays in many circumstances.”⁶⁴ Writing from a consumer law perspective, Jeff Sovern noted that consumers seem to reject the Posner vision of privacy as a means to an end rather than an end in itself.⁶⁵ Rosen argued that Posner’s vision of privacy fails to recognize that a “central value of privacy” is to prevent individuals “from being misidentified and judged out of context in a world of short attention spans, a world in which information can easily be confused with knowledge.”⁶⁶ Certain categories of information about executives might be subject to Rosen’s argument. For example, executives might want to keep the specific details of health information private because of a belief that shareholders—the vast majority of whom are not trained in medicine—will not understand the actual implications of the health issue for the executive’s performance.

60. Richard A. Posner, *The Right of Privacy*, 12 GA. L. REV. 393, 394 (1978).

61. RICHARD A. POSNER, *THE ECONOMICS OF JUSTICE* 233-34 (1983) (arguing that the individual want for privacy stems from people’s desire “to manipulate the world around them by selective disclosure of facts about themselves”).

62. Richard S. Murphy, *Property Rights in Personal Information: An Economic Defense of Privacy*, 84 GEO. L.J. 2381, 2383 (1996).

63. *Id.* at 2386.

64. Paul M. Schwartz, *Privacy and the Economics of Personal Health Care Information*, 76 TEX. L. REV. 1, 22 (1997).

65. Jeff Sovern, *Opting In, Opting Out, or No Options at All: The Fight for Control of Personal Information*, 74 WASH. L. REV. 1033, 1052 (1999).

66. JEFFREY ROSEN, *THE UNWANTED GAZE: THE DESTRUCTION OF PRIVACY IN AMERICA* 8 (2000); see also Lawrence Lessig, *Privacy and Attention Span*, 89 GEO. L.J. 2063 (2001) (expanding Rosen’s argument beyond the privacy context).

Finally, the economics of privacy literature recognized the secondary harms that can occur when privacy is not adequately protected. For example, disclosure, or interference with privacy, can diminish the extent to which people engage in the underlying activity. This constitutes a social harm unless society wants to discourage the underlying activity.⁶⁷ In the context of personal health care information, this sort of distortion can lead to negative consequences including declines in preventive care.⁶⁸

With privacy largely rehabilitated as a legitimate interest, a new economics of privacy emerged, which not only sought to reconsider privacy questions in light of technological developments,⁶⁹ but also for the first time applied formal microeconomic modeling to various aspects of the privacy debate. Significantly, the new literature recognized privacy as a legitimate interest worthy of economic protection, although not at all costs.⁷⁰ This literature also explored the role of contracts and the market in addressing various privacy-based problems.⁷¹ Similarly, this Article recognizes the executive's privacy as an interest worthy of society's consideration, but grapples with how to measure the value of that interest in light of competing disclosure costs to protection.

2. *Heterogeneous Privacy Preferences*

Evidence suggests that individual privacy preferences are heterogeneous. While numerous studies and surveys demonstrate that individuals value privacy, no conclusive work has established a measurement or distribution of that value.⁷² Most of the work that has been done within the consumer context, however, is consistent with a view that privacy preferences are heterogeneous.⁷³ For example, several polls suggest that some consumers have more of a taste for privacy than others. A 1990 Equifax survey showed that 39% of respondents viewed the sharing of information by companies in the

67. Murphy, *supra* note 62, at 2387.

68. Schwartz, *supra* note 64, at 31-33.

69. See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461 (2000) (applying aspects of a law and economics approach in concluding that privacy is not dead despite the various technological advancements encroaching upon it).

70. See *id.* at 1467.

71. Patricia Sánchez Abril, *Private Ordering: A Contractual Approach to Online Interpersonal Privacy*, 45 WAKE FOREST L. REV. 689 (2010) (proposing a standardized system of online user-to-user confidentiality agreements as a way to address privacy in social media); Karl T. Muth, *Googlestroika: Privatizing Privacy*, 47 DUQ. L. REV. 337 (2009) (describing from a law-and-economics perspective why Google is ideally positioned to price privacy); Joseph Siprut, *Privacy Through Anonymity: An Economic Argument for Expanding the Right of Privacy in Public Places*, 33 PEPP. L. REV. 311 (2006) (arguing for expanding the right of privacy by extending the reach of related tort law for economic reasons).

72. Hui & Png, *supra* note 58, at 489.

73. Further empirical work demonstrating the heterogeneity of privacy preferences for both individuals and specifically executives would helpfully contribute to this scholarship.

same industry as a major problem, 43% called it a minor problem, and 16% said it was not a problem at all.⁷⁴ Similarly, 57% of consumers responded that providing excessively personal information is a major problem, 33% identified it as a minor problem, and 10% identified no problem at all.⁷⁵ This complicates the already challenging question of how to account for competing privacy and disclosure interests.

Extrapolating from similar privacy opinion surveys, privacy scholar Alan Westin concluded that the American public can be divided into three basic clusters of privacy preferences.⁷⁶ At one extreme are the privacy fundamentalists, which Westin estimated to be approximately 25% of the population.⁷⁷ Privacy fundamentalists view privacy as “especially high value,” and believe that more individuals should refuse to give out information they are asked for.⁷⁸ The largest group, which Westin called privacy pragmatists and estimated at 55% of the population, takes a more nuanced approach to privacy.⁷⁹ This group balances the value of requests for personal information both to them and society and “decides whether they will agree or disagree with specific information activities.”⁸⁰ Finally, the privacy unconcerned group, estimated at 20%, fails to recognize “what the ‘privacy fuss’ is all about.”⁸¹ This group has no objection to supplying personal information to the government or businesses.⁸²

Similarly, business scholar Il-Horn Hann, and information systems scholars Kai-Lung Hui, Tom S. Lee, and I.P.L. Png identified three distinct segments in the consumer population based on privacy preferences.⁸³ Rather than using opinion surveys, these scholars employed the technique of conjoint analysis⁸⁴ across focus groups in both the United States and Singapore to assess trade-offs among five dimensions—two benefits and three privacy concerns.⁸⁵ Employing cluster analysis,⁸⁶ Hann, Hui, Lee, and Png found that 72% of the Ameri-

74. Sovern, *supra* note 65, at 1059.

75. *Id.*

76. Westin, *supra* note 10.

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

83. Hann et al., *supra* note 10, at 3.

84. Conjoint analysis is a technique that presents test subjects with a set of alternatives consisting of particular levels of various dimensions. The subject is then asked to rank the alternatives based on individual preferences. Conjoint analysis then assumes that the ranking “can be decomposed into the sum of contributions from the multiple dimensions.” Then each part-worth is equivalent to the marginal utility of the dimension in the individual’s ranking of the conjoint stimuli. *Id.* at 8.

85. *Id.* at 9.

86. Cluster analysis “groups subjects into distinct segments according to the similarity of their estimated part-worths for the various dimensions.” *Id.* at 14.

can subjects can be characterized as “privacy guardians”—those who attach a relatively high value to information privacy.⁸⁷ Approximately 20% of the American subjects can be characterized as “information sellers”—those who attach a relatively high value to monetary reward without much regard for privacy.⁸⁸

Although the conjoint analysis study broke down the groups differently than Westin, both observe very different attitudes towards privacy across individuals.⁸⁹ Despite possible methodological problems with both public opinion surveys⁹⁰ and the conjoint analysis study,⁹¹ this scholarship is at least consistent with the idea that some individuals “have more of a taste for privacy than others.”⁹² Behavioral economic theories may also support the idea that privacy preferences are heterogeneous. Economists hypothesize that “[p]ersonal information is such a sensitive thing that individual behavior is relatively more likely to depart from the rational model with respect to personal information than other things.”⁹³

Despite the fact that this scholarship has taken place in the context of consumer preferences, there is no particular reason to believe that the pool of potential corporate executives would be different from the general population in having heterogeneity of preferences. Therefore, although further work is necessary to be able to say with any certainty that (absent sorting resulting from existing disclosure policies) executive privacy preferences would be heterogeneous, the existing evidence is certainly consistent with that hypothesis.

If in fact privacy preferences are heterogeneous, and it is both difficult to measure those preferences, as well as to fully understand how those preferences are distributed, then creating a singular uniform policy that adequately accounts for both disclosure and privacy interests would be challenging. Instead, these broad differences in privacy preferences suggest that for any rule to adequately accommodate the preferences of different individuals, that rule will need to

87. *Id.* at 15.

88. *Id.* Finally, the smallest cluster of subjects focused exclusively on convenience with little regard for money or website privacy policies. This final group, however, is less relevant outside the context of consumer studies, as convenience plays less of a role in the executive disclosure context. *Id.*

89. *See id.* at 16.

90. Although surveys may be affected by the manner in which the questions are posed, even taking this into account, Sovern concludes that the surveys seem to indicate that consumers are divided. Sovern, *supra* note 65, at 1061.

91. For example, the authors point that the subjects were all undergraduate students and therefore would want to verify the findings with a more representative sample of subjects. Hann et al., *supra* note 10, at 19.

92. Sovern, *supra* note 65, at 1058.

93. Hui & Png, *supra* note 58, at 492.

be flexible by design.⁹⁴ Heterogeneous privacy preferences may also suggest additional reasons that reinforce why the executive's interest in privacy should not be easily dismissed. Absent an ability to protect privacy in some way, a private candidate for a corporate executive position may forgo the opportunity for fear that it will require unacceptable intrusions of privacy. Since there is no reason to believe that society inherently prefers corporate executives who do not care about privacy, the sorting that would result harms society by unnecessarily limiting the pool of individuals who can then be corporate executives in public companies. Furthermore, to the extent that corporations are increasingly in a position of imposing upon the privacy of individuals,⁹⁵ there may be a problem with allowing decisionmaking about the privacy of society to be concentrated largely in the hands of those with lower valuations of privacy.⁹⁶

C. *Status Quo Failures*

The privacy-disclosure problem explained thus far requires a solution that appropriately considers both the disclosure and privacy interests, and takes into account the fact that privacy preferences may be heterogeneous.⁹⁷ The status quo fails to satisfy these requirements. Although it is unclear what exactly is required with regard to disclosure of personal information about executives under the current corporate disclosure regime, it is clear that the regime offers no explicit method for taking into account privacy interests, much less heterogeneity in those interests.⁹⁸ At the same time, the various statutory, constitutional, and tortious privacy laws were not designed to target the corporate disclosure context, and thus fail to adequately

94. See *id.* at 1059 (making a similar point in the consumer context). See also Cass R. Sunstein, *Impersonal Default Rules vs. Active Choices vs. Personalized Default Rules: A Triptych* 25 (Mossavar-Rahmani Ctr. for Bus. & Gov't, Working Paper RPP-2012-17, 2012) (pointing out the implications of heterogeneity on personalized default rules).

95. See Marcy E. Peek, *Information Privacy and Corporate Power: Towards a Re-Imagination of Information Privacy Law*, 37 SETON HALL L. REV. 127, 137-60 (2006) (arguing that information privacy is governed not just by governmental law but also by corporations via private governance).

96. This concern will be explored further in future scholarship.

97. See *supra* Part II.

98. The scholars and practitioners considering the privacy-disclosure problem and attempting solutions to that problem have also not accounted for the additional wrinkle of possible heterogeneity in privacy preferences. See Heminway, *supra* note 5, at 790-96 (describing a proposal for a new way of dealing with disclosure of executives' personal facts); Horwich, *supra* note 11, at 862-70 (proposing an addition to form 8-K addressing specifically disclosure of serious illness of executives); Lin, *Undressing the CEO*, *supra* note 11, at 409-16 (describing a two-step, principle-based model for disclosure); Andrew K. Glenn, Note, *Disclosure of Executive Illnesses Under Federal Securities Law and the Americans with Disabilities Act of 1990: Hobson's Choice or Business Necessity?*, 16 CARDOZO L. REV. 537, 588-89 (1994) (proposing a safe harbor for corporations for nondisclosure of executive health information). But see Abril & Olazábal, *supra* note 11, at 1549-50 (defending the status quo).

address the problem. With neither corporate law nor privacy law providing any clarity, corporations, executives, and shareholders lack guidance and certainty with regard to the disclosure of the executives' personal information.

1. Corporate Disclosure Rules Ignore Privacy

No consensus exists regarding when and under what circumstances the disclosure of private facts about executives is required under the existing legal corporate disclosure regulatory and statutory framework.⁹⁹ Other than specific rules requiring the disclosure of the CEO's age,¹⁰⁰ the CEO's involvement in certain legal proceedings,¹⁰¹ and the compensation of five highly paid executives,¹⁰² the existing securities rules and regulations governing corporate disclosure contain no specific itemized guidance for disclosure of personal information about executives. Instead, private facts about executives seem to be subject to disclosure under the same general disclosure regime created by the Exchange Act and the SEC rules as other types of corporate information.¹⁰³ Scholars and practitioners disagree, however, as to whether there is anything in the securities laws that creates a duty to disclose personal information about executives.¹⁰⁴

99. See, e.g., Nocera, *supra* note 1 ("There are no hard and fast rules about how and when companies need to disclose information about the health of their chief executives."); Benjamin Pimentel, *Public Disclosure: Health of CEOs Brings Up Issues of Personal Privacy*, S.F. CHRON. (Aug. 3, 2004), <http://www.sfgate.com/business/article/Public-disclosure-Health-of-CEOs-brings-up-2736558.php> ("There are no rules on what CEOs are supposed to disclose about their health. . . . 'The question is what and when and how much, and that's always been a matter of some dispute.' " (citation omitted)); Brad Stone, *Apple Chief Goes Public on Health*, N.Y. TIMES, Jan. 6, 2009, at B1 (reporting that a former SEC commissioner stated that there was little agreement among legal scholars about what needs to be disclosed when a CEO becomes ill).

100. Item 401 of Regulation S-K requires disclosure of general biographical detail including the CEO's age. 17 C.F.R. § 229.401(b) (2012).

101. Item 401(f) of Regulation S-K requires the company to disclose the CEO's personal bankruptcy filings, any adjudicated violations of the securities or commodities laws, and the fact that the CEO "was convicted in a criminal proceeding or is a named subject of a pending criminal proceeding (excluding traffic violations and other minor offenses)." This rule does not on its face apply to most types of civil litigation, such as divorce or a criminal investigation. *Id.* § 229.401(f)(1), (2).

102. Regulation S-K, Item 402, requires disclosure of the salary, bonus, stock awards, stock option awards, and other components of compensation for the principal executive officer, principal financial officer, and the three most highly compensated executive officers other than the former. *Id.* § 229.402.

103. See Stone, *supra* note 99 (noting a statement by a former member of the SEC that while there are no specific disclosure requirements for the health of corporate officers, there is also nothing in the federal securities laws about privacy rights).

104. Compare Abril & Olazábal, *supra* note 11, at 1591 (finding no basis for an affirmative duty to disclose private CEO facts), with Horwich, *supra* note 11, at 838 (expressing that there is "little doubt that [the requirement to disclose 'known . . . uncertainties . . . that the registrant reasonably expects will have a material . . . unfavorable impact on net sales or revenues or incomes from continuing operations'] would encompass material uncertainties arising out of a known health problem suffered by a luminary" (footnote and

Where a duty to disclose arises, disclosure issues primarily depend on whether a given fact is material.¹⁰⁵ Under existing Supreme Court precedent information is material if there is a substantial likelihood that a reasonable shareholder would consider the information important in making an investment decision, or if disclosure of the fact would be viewed by a reasonable investor as significantly altering the “total mix” of information.¹⁰⁶ For so-called soft information regarding predictions and other forward-looking information, a somewhat different test applies, in which materiality depends on “a balancing of both the indicated probability that the event will occur and the anticipated magnitude of the event in light of the totality of the company activity.”¹⁰⁷

Neither of these tests contains any explicit consideration of privacy as a countervailing interest, yet some commentators seem to sense that privacy does, or at least ought to, play a role in the analysis.¹⁰⁸ Even in the absence of an explicit privacy consideration, scholars and commentators have noted the difficulty in applying these materiality standards to the personal information of executives.¹⁰⁹ No court decision has weighed in on the question, nor has the SEC offered any guidelines.¹¹⁰

2. Privacy Law Lacks Clarity

The various privacy laws fail to add clarity to the corporate disclosure framework. A clearly defined constitutional informational privacy right would eliminate or at least narrow the normative policy question because it would be unconstitutional for the government to mandate disclosure of at least some categories of executive information. No such clearly established informational privacy right

citation omitted)), and *id.* at 841 (finding a possible duty to disclose from the Rule 12b-20 requirement for disclosing material omissions). *Accord* Heminway, *supra* note 5, at 757 (noting that “the gap-filling rules may require public disclosure of executives’ personal facts”).

105. See Abril & Olazábal, *supra* note 11, at 1596-1600 (distinguishing the duty to disclose from the concept of materiality and explaining that materiality only comes into play once a duty to disclose has been triggered).

106. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988) (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

107. *Basic*, 485 U.S. at 238.

108. Patrick McGurn, senior vice president of Institutional Shareholder Services, explained that while there is no clear rule for when corporations must disclose personal information, part of that analysis involves weighing an individual’s privacy rights against the value of that information to the marketplace. See Pimentel, *supra* note 99.

109. Horwich, *supra* note 11, at 864 (arguing that “determining whether an ailment is material is often difficult” and “presents difficult questions of judgment”); Lin, *Undressing the CEO*, *supra* note 11, at 408 (explaining that the “federal securities laws along with historic and widely-accepted practices . . . offer little clear guidance as to what a company should do” when it comes to disclosing personal facts about executives).

110. Lin, *Undressing the CEO*, *supra* note 11, at 386.

exists under the current state of constitutional law.¹¹¹ Although two 1977 Supreme Court cases, *Whalen* and *Nixon*, referred broadly to a constitutional privacy “interest in avoiding disclosure of personal matters,”¹¹² neither case made clear that such an interest actually existed, or what test applied to determine whether any such constitutional privacy interest had been triggered. Subsequently, circuit courts offered varying interpretations of the two decisions, ranging from a requirement that disclosure of some types of personal information should be subject to a balancing test between the government’s interest and the individual’s interest in avoiding disclosure,¹¹³ to a belief that any constitutional informational privacy right only extends to interests “that can be deemed ‘fundamental’ or ‘implicit in the concept of ordered liberty.’”¹¹⁴ The D.C. Circuit went so far as to express “grave doubts as to the existence of a constitutional right [to informational] privacy.”¹¹⁵

More recently, the Supreme Court again weighed in on the question of an informational right to privacy in *NASA v. Nelson*,¹¹⁶ but did not provide much further clarity. The majority opinion chose to “assume, without deciding, that the Constitution protects” a constitutional privacy interest in avoiding disclosure of personal matters.¹¹⁷ In applying this hypothetical constitutional right, the Court appears to have balanced the governmental interest with the privacy interest, but did so without any clear articulation of the governing rules. The Court does not appear to have applied the “fundamental rights” strict scrutiny analysis of *Roe v. Wade*,¹¹⁸ but instead described the government’s actions as “reasonable and further[ing] its interests.”¹¹⁹ In fact, the Court seemed to reject a strict scrutiny inquiry, at least in the particular context at issue in that decision, when it rejected the argument that the government “has a constitutional burden to demonstrate that

111. *But see* Stokes, *supra* note 5, at 313-22 (concluding that a regulation requiring corporate executives to disclose health issues to shareholders would not be constitutional).

112. *Whalen v. Roe*, 429 U.S. 589, 599 (1977); *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 457 (1977) (citing *Whalen*).

113. *See In re Crawford*, 194 F.3d 954, 959 (9th Cir. 1999); *Woodland v. City of Houston*, 940 F.2d 134, 138 (5th Cir. 1991) (per curiam); *Fraternal Order of Police v. City of Phila.*, 812 F.2d 105, 110 (3d Cir. 1987); *Barry v. City of New York*, 712 F.2d 1554, 1559 (2d Cir. 1983).

114. *J.P. v. DeSanti*, 653 F.2d 1080, 1090 (1981).

115. *Am. Fed’n of Gov’t Emps. v. Dep’t of Hous. & Urban Dev.*, 118 F.3d 786, 791 (D.C. Cir. 1997).

116. 131 S. Ct. 746 (2011).

117. *Id.* at 751.

118. 410 U.S. 113, 155 (1973). Others had suggested that such a strict scrutiny test would apply to informational privacy. *See* Stokes, *supra* note 5, at 314 (“[C]ourts would next likely apply the strict scrutiny test to determine whether the regulation is narrowly tailored to advance a compelling state interest, and goes no further than necessary to accomplish this objective.”).

119. *NASA*, 131 S. Ct. at 761.

its questions are ‘necessary’ or the least restrictive means of furthering its interests.”¹²⁰ In a pair of concurrences, both Justice Scalia and Justice Thomas stated that they would have held that a “federal constitutional right to ‘informational privacy’ does not exist.”¹²¹

In short, even after *NASA* it is not clear that a constitutional right to informational privacy exists. Furthermore, even if such a right does exist, it seems likely that a government regulation requiring corporate executives to disclose some personal information would still pass constitutional muster, as long as the regulation sought to reach some sort of balance between the government’s interest in requiring disclosure in order to keep the markets functioning properly on behalf of shareholders, and the privacy interest of the executive.

Similarly, the various federal and state statutory privacy protections do not resolve the disclosure-privacy issue in part because they were not designed with this particular problem in mind. Many privacy statutes in the United States are specifically tailored to a particular problem, and none seem to anticipate this particular situation.¹²²

Many federal privacy statutes only apply to certain statutorily defined entities. For example, in the context of health information, the Health Insurance Portability and Accountability Act (HIPAA), enacted by Congress in 1996, seeks to protect the security and privacy of health information.¹²³ The “Privacy Rule” regulations implementing HIPAA protect the privacy of health information, in part by prohibiting its disclosure without the consent of the individual, unless the disclosure is pursuant to one of the enumerated exceptions.¹²⁴ HIPAA only applies, however, to “covered entities,” which include (1) health plans, (2) health care clearinghouses, (3) health care providers, as well as business associates to those covered entities.¹²⁵ Although the regulations did recognize the need to strike a balance between privacy concerns and the need to use certain health care information, the primary focus was on improving the efficiency of the health care

120. *Id.* at 760.

121. *Id.* at 764 (Scalia, J., concurring); *see also id.* at 769 (Thomas, J., concurring) (“[T]he Constitution does not protect a right to informational privacy.”).

122. *See* Abril & Olazábal, *supra* note 11, at 1567-75 (examining the implications of various privacy-related federal statutes on corporate disclosure obligations and concluding that many employment-related privacy statutes apply in very limited situations and have “idiosyncratic application”). *But see* Glenn, *supra* note 98, at 588 (treating the problem as a conflict between the requirements imposed by the corporate disclosure obligations of the federal securities laws and the ADA’s confidentiality provisions, in which corporations are faced with a “Hobson’s choice of liability under the ADA or liability under the Securities and Exchange Acts”).

123. Health Insurance Portability and Accountability Act, Pub. L. No. 104-191, 110 Stat. 1936 (codified as amended in scattered sections of 18, 26, 29 and 42 U.S.C.).

124. 45 C.F.R. §§ 160, 164 (2012).

125. *Id.* § 160.103.

system.¹²⁶ Therefore, unrelated (albeit similar) concerns regarding the disclosure of executive information were not really on the radar, and corporate employers would not fall within HIPAA's definition of covered entities. Similarly, the Right to Financial Privacy Act of 1978¹²⁷ only prevents banks or other financial institutions from disclosing an individual's financial information to the government. It would not prevent most corporate employers from disclosing financial or other personal information about executives to its shareholders.

Other privacy statutes would apply to the corporation as an employer, but only limit use of information obtained in very specific ways. Most significantly, the Americans with Disabilities Act,¹²⁸ the Rehabilitation Act,¹²⁹ and the Family and Medical Leave Act¹³⁰ all contain nondisclosure provisions with regard to the disclosure of certain types of health and disability-related information. On their face, these statutes do not contain any explicit provisions under which an employee can waive rights of confidentiality for medical information. As a result, some have argued that the ADA may prevent any mandatory shareholder disclosure requirement of executive illnesses.¹³¹ The case law interpreting the ADA and the other related statutes, however, has interpreted the nondisclosure provisions to be limited to information obtained as the result of an authorized medical examination or inquiry. Information obtained by the employer as the result of a voluntary disclosure on the part of the employee may be disclosed without consequence under these statutes. In *Cash v. Smith*, for example, the Eleventh Circuit held that a plaintiff could not recover under the nondisclosure provisions of the ADA, Rehabilitation Act, and FMLA when she had told a manager of her diabetes diagnosis "in confidence."¹³² The court found that the disclosure to the employer was voluntary, and therefore the statutory provisions did not apply.¹³³ Similarly, in *EEOC v. C.R. England, Inc.*, the Tenth Circuit held that when an employee voluntarily informed his human resources manager that he was HIV positive, there was no violation of the ADA nondisclosure provisions when the company created an acknowledgement form to inform his driver trainees of his HIV

126. See Standards for Privacy of Individually Identifiable Health Information, 65 Fed. Reg. 82,426, 82,464 (Dec. 28, 2000); 67 Fed. Reg. 14,776, 14,778-83 (proposed Mar. 27, 2002); 67 Fed. Reg. 53,182, 53,208 (Aug. 14, 2002).

127. 12 U.S.C. §§ 3401-3421 (2012).

128. 42 U.S.C. §§ 12101-12213 (2012).

129. 29 U.S.C. § 794 (2012).

130. Family and Medical Leave Act (FMLA) of 1993, Pub. L. No. 103-3, 107 Stat. 6 (codified at 29 U.S.C. §§ 2601-2654 (2012)).

131. Glenn, *supra* note 98, at 588.

132. *Cash v. Smith*, 231 F.3d 1301, 1303 (11th Cir. 2000).

133. *Id.* at 1307.

status.¹³⁴ This means that a corporation could disclose the health-related information of an executive if the executive voluntarily revealed the information to the corporation.

Furthermore, district courts following the *Cash* and *C.R. England* precedents have taken a broad understanding of what constitutes a voluntary disclosure. For example, courts have found that a disclosure was voluntary when an employer e-mailed an employee stating, “We need to know what’s going on,” when the employee had missed work without any explanation.¹³⁵ The court held that even though the employer initiated the interaction, because the employer did not ask specifically about a medical condition, this did not constitute a request or demand for medical information by the employer that would trigger the nondisclosure provisions of the ADA.¹³⁶ Similarly, courts have found that when an employer asks, “Is everything okay?” after an employee returns from a medical appointment, if the employee then proceeds to disclose the diagnosis and related disability, this constitutes a voluntary disclosure that does not trigger the nondisclosure protections of the ADA.¹³⁷ Consequently, if a corporation notices a change in an executive’s physical appearance and just asks the executive, “Is everything okay?” the corporation would have no nondisclosure obligation under the ADA and the related statutes with respect to any information provided pursuant to that inquiry.

Other privacy statutes also limit protections to information obtained in particular ways. For example, the Employee Polygraph Protection Act of 1988 (EPPA) prohibits private employers from requiring employees or prospective employees from taking a lie detector test, or to use the results of such a test.¹³⁸ Similarly, the Fair Credit Reporting Act covers an employer’s use of information collected as part of a “consumer report” on an employment application.¹³⁹ Neither statute governs the disclosure of employee information more generally, much less considers the particular circumstances of an executive-level employee in a publically traded corporation.

By contrast, genetic information may constitute the one category of information where privacy laws may limit corporate disclosure of personal information about executives. In addition to its various provisions prohibiting discrimination against employees because of genetic information, the Genetic Information Nondiscrimination Act

134. *EEOC v. C.R. England, Inc.*, 644 F.3d 1028, 1032-33, 1046-48 (10th Cir. 2011); *see also Ballard v. Healthsouth Corp.*, 147 F. Supp. 2d 529, 534-35 (N.D. Tex. 2001) (finding no breach of confidentiality under the ADA when employee voluntarily disclosed the result of his HIV test to his manager, although he asked the manager to keep the information confidential).

135. *EEOC v. Thrivent Fin. for Lutherans*, 795 F. Supp. 2d 840, 842 (E.D. Wis. 2011).

136. *Id.* at 845.

137. *Sherrer v. Hamilton Cnty. Bd. of Health*, 747 F. Supp. 2d 924, 931-34 (S.D. Ohio 2010).

138. 29 U.S.C. § 2002 (2012).

139. 15 U.S.C. § 1681m(a) (2012).

of 2008 (GINA),¹⁴⁰ contains limitations on disclosure of genetic information.¹⁴¹ Although there is not yet any case law interpreting these provisions, GINA appears to limit corporations from disclosing genetic information concerning its corporate executives to its shareholders, although it is unclear whether there would be any problem under GINA with the executive him or herself making the disclosure.

3. *Corporate Practice Reflects Uncertainty*

Corporate disclosure behavior mirrors the lack of clarity in the existing law. Corporations seeking to strike the appropriate balance between executive privacy and shareholder disclosure obligations have taken vastly different approaches.¹⁴² This state of confusion leaves both executives and shareholders uncertain as to when to expect disclosure of personal information about the executives.

Apple's widely-discussed decision to take a strong nondisclosure position with regard to the health of CEO Steve Jobs provides an example of one possible approach. In October 2003, doctors diagnosed Jobs with a rare treatable form of pancreatic cancer, for which the vast majority of those who had the tumor surgically removed survived at least ten years.¹⁴³ Skeptical of mainstream medicine, however, Jobs pursued alternative methods to treat his cancer rather than undergo the operation.¹⁴⁴ As Jobs fought his cancer without surgery, Apple's board of directors and executive team agonized over whether the company needed to disclose anything about his health to shareholders.¹⁴⁵ After seeking advice from two outside lawyers, the board decided to say nothing.¹⁴⁶ Ultimately, Jobs had the surgery at the end of July 2004, and the next day in an optimistic e-mail to Apple employees, Jobs revealed that he had faced a life-threatening illness, was now "cured," and would return to the job in September.¹⁴⁷ The

140. 42 U.S.C. §§ 2000ff to 2000ff-11 (2012).

141. 42 U.S.C. § 2000ff-5(b) (2012).

142. See Lin, *Undressing the CEO*, *supra* note 11, at 408 (noting that "the absence of clarity in the current regulatory model" has resulted in "disclosure practices varying from company to company").

143. Peter Elkind, *The Trouble with Steve Jobs*, FORTUNE (Mar. 5, 2008), http://money.cnn.com/2008/03/02/news/companies/elkind_jobs.fortune/index.htm.

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* Ironically, at the time some commentators praised Apple for being so forthcoming. Analyst Roger Kay of International Data Corp. speculated (wrongly) that Jobs and his doctors suspected something was wrong, and once they confirmed it, moved quickly. Kay praised Apple's decision to make the news public only when it was certain of the diagnosis. See Pimentel, *supra* note 99. Similarly, Patrick McGurn, senior vice president of Institutional Shareholder Services, called Apple's disclosure "a good pre-emptive move." *Id.*

next day Apple shares fell 2.4%.¹⁴⁸ Citing Jobs' need for privacy, Apple would not answer further questions about his health.¹⁴⁹

Concerns over Jobs' health reappeared in June 2008, when his gaunt appearance at Apple's annual Worldwide Developers Conference triggered rumors that he was again sick.¹⁵⁰ Investors and analysts turned to Apple for an explanation. Peter Oppenheimer, the company's chief financial officer replied that Jobs "serves as the C.E.O. at the pleasure of Apple's board and has no plans to leave Apple. Steve's health is a private matter."¹⁵¹ When Jobs announced that he would not give his annual keynote address at the Macworld conference in January 2009, rumors escalated leading to a 2.5% drop in Apple's share price.¹⁵² In response, Jobs issued a letter in which he claimed that his dramatic weight loss was due to a nutritional problem with a simple remedy and that he would continue as Apple's CEO.¹⁵³ Only one week later, however, Jobs released another statement that his health situation was "more complex" and he would be taking a leave from the company.¹⁵⁴ This resulted in a 7% drop in Apple's stock price.¹⁵⁵ In June 2009, Apple disclosed that Jobs had received a liver transplant two months earlier, but offered no further information.¹⁵⁶ Finally, in January 2011, Jobs announced that he would once again take a medical leave from Apple without sharing any details of his condition with investors.¹⁵⁷ In response, Apple's stock dropped by 2.3%, but recovered the following day in light of news of Apple's strong quarterly results.¹⁵⁸ During his leave in August 2011, Jobs resigned as CEO but continued to work from home as Chairman of the Board.¹⁵⁹ On October 5, 2011, Jobs died from complications from his cancer at the age of 56.¹⁶⁰

148. Elkind, *supra* note 143.

149. *Id.*

150. Nocera, *supra* note 1.

151. *Id.*

152. Benjamin Pimentel, *Apple says 2009 Macworld Expo Will be Its Last*, MARKETWATCH (Dec. 16, 2008), http://articles.marketwatch.com/2008-12-16/news/30741847_1_macworld-show-macworld-boston-macworld-new-york.

153. Tom Abate, *Apple's Jobs Is Taking Leave*, S.F. CHRONICLE, Jan. 15, 2009, at A1.

154. *Id.*

155. *Id.*

156. Yukari Iwatani Kane & Joann S. Lublin, *Jobs Had Liver Transplant --- Apple Chief on Track to Return to Work at End of June; No. 2 May Expand Role*, WALL ST. J. (June 20, 2009), <http://online.wsj.com/article/SB124546193182433491.html>.

157. Yukari Iwatani Kane, *Apple Soars, but Mum on Jobs*, WALL ST. J. (Jan. 19, 2011), <http://online.wsj.com/article/SB10001424052748703954004576090362119740134.html>.

158. *Id.*

159. Patricia Sullivan, *Apple Visionary Steve Jobs Dies*, WASH. POST (Oct. 6, 2011), <http://www.startribune.com/obituaries/131184473.html>.

160. John Markoff, *Redefined the Digital Age As the Visionary of Apple*, N.Y. TIMES (Oct. 6, 2011), http://www.nytimes.com/2011/10/06/business/steve-jobs-of-apple-dies-at-56.html?pagewanted=all&_r=0.

In contrast to Apple's privacy-protective nondisclosure approach, Berkshire Hathaway took a different approach with regard to the health of its founder and chairman Warren Buffett. In 2000, Buffett underwent colon surgery to remove benign polyps in his colon.¹⁶¹ As opposed to the minimal information revealed by Apple after the fact, Berkshire Hathaway opted to provide a detailed press release before the surgery informing shareholders that Buffett expected to have the surgery and the circumstances that led to the surgery.¹⁶² Then, in 2012, Berkshire Hathaway revealed that Buffett had been diagnosed with early-stage prostate cancer and that he would undergo radiation treatment beginning in July.¹⁶³

Although undoubtedly Jobs and Buffett represent unique examples in the degree to which they were viewed as indispensable corporate luminaries within their respective companies, the same issue of whether and to what extent personal information about executives ought to be disclosed to shareholders arises with far less notable executives.

Some companies have chosen to disclose a good deal of information based on an apparent belief that it is legally required for them to do so. For example, after suffering from leukemia during his tenure as an executive, General Motors vice-chairman Harry J. Pearce opined that "[t]here is an absolute requirement to make full disclosure. And by full disclosure I mean full public disclosure."¹⁶⁴ Consistent with that view, GM disclosed Pearce's illness when it was diagnosed.¹⁶⁵ Dick Brewer, the former CEO of biotech firm Scios, took the same position: "I don't think you have to describe every last detail of your illness," he explained, "[b]ut you need to describe basically what it is, and how it's going to be dealt with and how you plan to manage the company while being treated."¹⁶⁶ Based on that understanding, Brewer and his company's board immediately revealed to the shareholders when he was diagnosed with cancer.¹⁶⁷

In 1993, Tenneco disclosed that CEO Michael Walsh had brain cancer.¹⁶⁸ McDonald's also chose to disclose the news when its CEO

161. SCHROEDER, *supra* note 3, at 700-01.

162. *Id.*

163. Warren Buffett Says He Has Early Prostate Cancer, *NEWSDAY* (Apr. 18, 2012), <http://www.newsday.com/news/nation/warren-buffett-says-he-has-early-prostate-cancer-1.3667896>.

164. Jonathan D. Glater, *Five Questions for Harry J. Pearce: An Honesty Policy on Executive Illness*, *N.Y. TIMES* (July 8, 2001), <http://www.nytimes.com/2001/07/08/business/five-questions-for-harry-j-pearce-an-honesty-policy-on-executive-illness.html>.

165. See George Gunset, *GM Says Executive Has Leukemia*, *CHI. TRIB.* (June 6, 1998), http://articles.chicagotribune.com/1998-06-06/business/9806060166_1-general-motors-corp-gm-leukemia.

166. Pimentel, *supra* note 99.

167. *Id.*

168. Thomas C. Hayes, *Tenneco's Chief Has Brain Cancer*, *N.Y. TIMES* (Jan. 21, 1993), <http://www.nytimes.com/1993/01/21/business/tenneco-s-chief-has-brain-cancer.html>.

Charles Bell was diagnosed with colon cancer.¹⁶⁹ When Coca-Cola Co.'s longtime chief executive and chairman, Roberto C. Goizueta, was hospitalized for a malignant tumor in his lungs, Coca-Cola disclosed the fact of hospitalization, along with a disclosure that Goizueta had smoked cigarettes for years.¹⁷⁰ Of course, Coca-Cola tried to mitigate the impact of the news by also disclosing the treatment plan and stating that the executive planned to continue working while receiving radiation treatment.¹⁷¹ Some outlier companies have even gone so far as to disclose possible future health situations. For example, Google announced that one of its executives has a gene mutation that increases his chances of having Parkinson's disease.¹⁷²

Other companies have taken Apple's approach and disclosed far less information about their executives. For example, Intel did not disclose its CEO's prostate cancer diagnosis.¹⁷³ Similarly, Bear Stearns' CEO Jimmy Cayne opted to entirely hide his near death from a prostate infection during the credit crisis because he feared that disclosing the information would cause Bear Stearns' stock to crash. His hospitalization and life-threatening condition only came to light once the company had been sold.¹⁷⁴ And in contrast with Google's treatment of a Parkinson's diagnoses, one chief executive kept his Parkinson's diagnosis secret for almost twenty years.¹⁷⁵

Time Warner took a mixed approach with regard to the health information about CEO Steven Ross. In June 1980, Ross had a heart attack which he kept secret on the grounds that it would be "bad for the company" if it became public.¹⁷⁶ Then in the mid-1980s, Ross was diagnosed with prostate cancer, but the diagnosis was never publicly disclosed despite the fact that he apparently had surgery and received radiation.¹⁷⁷ In November 1991, however, when the cancer returned, Time Warner promptly revealed to its shareholders that Ross

169. See Nocera, *supra* note 1. Of course, the McDonald's situation occurred in a particular context. The previous CEO, James R. Cantalupo, had died of a massive heart attack at age sixty, which caused McDonald's stock to drop 2.6%. Gibson & Steven Gray, *Sudden Loss: Death of Chief Leaves McDonald's Facing Challenges*, WALL ST. J., Apr. 20, 2004, at A1. Hours after Cantalupo's death, Bell was appointed at the young age of forty three, but would be diagnosed with colon cancer only two weeks later. His poor health forced Bell to resign in November 2004, only two months before his death. Steven Gray & Jonathan Eig, *McDonald's CEO Quits to Fight Cancer*, WALL ST. J., Nov. 23, 2004, at A3.

170. Brett D. Fromson, *Coca-Cola's CEO Hospitalized with Lung Cancer*, WASH. POST, Sept. 9, 1997, at C3.

171. *Id.*

172. See Miguel Helft, *Google Co-Founder Has Genetic Code Linked to Parkinson's*, N.Y. TIMES, Sept. 19, 2008, at C2. Note that this appears to be precisely the sort of genetic disclosure that would be prohibited by GINA, as discussed *supra* pp. 511-12.

173. See Nocera, *supra* note 1.

174. Horwich, *supra* note 11, at 830.

175. See David Jones, *Life After Parkinson's*, 324 BRIT. MED. J. 1531 (2002).

176. CONNIE BRUCK, *MASTER OF THE GAME: STEVE ROSS AND THE CREATION OF TIME WARNER* 190 (1994).

177. *Id.* at 226.

had been diagnosed with cancer,¹⁷⁸ and then subsequently disclosed his leave of absence when he needed further treatment,¹⁷⁹ albeit with a positive spin. Despite Time Warner's assurances that the "physicians are optimistic,"¹⁸⁰ Ross never returned to his office. As with Apple and Steve Jobs, it was only in mid-June 1992 that Ross finally publicly conceded the seriousness of his illness when he announced that he would be taking a temporary leave of absence.¹⁸¹

Other companies have chosen intermediate routes, disclosing only partial information. Kraft Foods, Inc. did not disclose the reason behind the hospitalization of its CEO, which led to a controversy.¹⁸² Most recently, Sara Lee revealed that its CEO Brenda Barnes was taking a temporary medical leave, but did not initially disclose that she had had a stroke.¹⁸³

Although most of the media publicity regarding personal executive information has occurred in the health context, disclosure issues can extend far beyond executive health. Other potential subjects for disclosure include criminal investigations,¹⁸⁴ financial trouble, divorce,¹⁸⁵ extramarital affairs or other romantic liaisons, the purchase of homes or other large luxury items, and the death or illness of a child or other loved one.

Overall, the lesson from the existing law, its treatment by the scholarship, and the way that it plays out in practice is that there remains a good deal of confusion regarding whether, when, and under what circumstances corporations must reveal personal information about its executives to its shareholders. This confusion can have a harmful impact on all the players involved as corporations, executives, and shareholders lack certainty with regard to how to account for both privacy and disclosure.

178. See Horwich, *supra* note 11, at 829.

179. *Id.*; Adam Bryant, *Time Warner's Chief Takes Indefinite Leave*, N.Y. TIMES, June 15, 1992, at D1.

180. BRUCK, *supra* note 176, at 318.

181. *Id.* at 323.

182. Pimentel, *supra* note 99.

183. Michael Oneal, *Sara Lee CEO Reveals She Had a Stroke: Brenda Barnes Recovering, but No Other Details Given*, CHI. TRIB., June 15, 2010, at C19.

184. For example, Chris Albrecht, the former chairman and CEO of HBO, was forced to resign days after his 2007 arrest for domestic violence. See Phil Rosenthal, *HBO Plot Twist: Executive Quits After Alleged Assault*, CHI. TRIB. (May 10, 2007), http://articles.chicagotribune.com/2007-05-10/business/0705091026_1_chris-albrecht-hbo-independent-productions-ceo-richard-parsons; Jacques Steinberg & Bill Carter, *After Arrest, HBO Chief Takes Leave of Absence*, N.Y. TIMES (May 9, 2007), http://www.nytimes.com/2007/05/09/arts/television/09hbo.html?_r=0. The *Los Angeles Times* exposed the fact that HBO had concealed prior domestic violence incidents, raising the question of whether HBO should have revealed such information. See Claudia Eller, *HBO Chief Accused of Assault in 1991*, L.A. TIMES (May 9, 2007), <http://articles.latimes.com/2007/may/09/business/fi-hbo9>.

185. For example, Steve Wynn tried unsuccessfully to seal the details of his divorce in order to keep it from shareholders. See Abril & Olazábal, *supra* note 11, at 1560.

III. NEGOTIATION AND DISCLOSURE OF DISCLOSURE POLICIES

This Article proposes one possible solution for tackling the privacy-disclosure problem discussed in Part II. This proposal involves a two-step process: 1) mandatory contracting between the executive and the corporation regarding the plan for disclosure of the executive's personal information, and then 2) mandatory disclosure of the negotiated disclosure plan to the shareholders. This solution deliberately presents a hybrid between a pure contracting solution advocated by one school of thought in the larger corporate disclosure context and a pure mandatory disclosure solution advocated by the opposing school of thought. In borrowing aspects from both types of regimes, the proposal takes advantage of beneficial features of both systems for the purposes of tackling this particular problem.

A. *Revealing Privacy Preferences via Contract*

The first step of the proposal envisions that the law would require executives and corporations to negotiate and then contract for an individualized policy for the disclosure of the executives' personal information. As a result of that process, the goal is to implement a disclosure policy that adequately captures the executive's privacy preferences while still accounting for the shareholders' disclosure interest. The outcome of the negotiation would therefore differ depending on the degree to which an executive values his or her own privacy. This mandatory *contracting* regime improves upon a traditional mandatory *disclosure* regime, which fails to allow any flexibility or opt-out to account for heterogeneous privacy preferences. If the existing studies in the consumer context are correct, even privacy guardians (what Westin calls privacy fundamentalists)¹⁸⁶ are willing to part with privacy, but for a very high cost.¹⁸⁷ Through contract the parties can decide whether it is "worth it" to pay the high cost by increasing the compensation to the executive for the possible imposition on the strong privacy preference. In many cases, the answer may be that it is not worth that high cost, and the parties would end up with a private-disclosure policy in which a good deal of executive's personal information will not be disclosed. For privacy pragmatists, the cost of giving up privacy will be lower, although still not trivial. Privacy pragmatists might be expected to have strong valuations for certain aspects of privacy, but perhaps not others. As a result, some of these executives would contract with the corporations for privacy-disclosure policies that protect those aspects of their privacy that they value the most highly, whereas other executives' privacy valuations may be within what the corporation is willing to pay.

186. See Westin, *supra* note 10.

187. See Hann et al., *supra* note 10, at 16.

Even accounting for a wide variety of privacy preferences, it is empirically possible that executive valuations of privacy always exceed the value of disclosure to the shareholders. Similarly, the exact opposite is also possible: that the value of disclosure to the shareholders always exceeds the individual valuations of privacy. In the former scenario, we would expect to see very privacy-protective disclosure policies, as it would not be worth it to the corporation to compensate the executive for a more disclosure-friendly policy. In the latter scenario, we would expect to see very disclosure-friendly disclosure policies and executives compensated for those policies, as it would be worth it to the corporation to essentially purchase the privacy violation from the executive. If either of these two extreme scenarios represents reality, then the negotiation and contracting solution should still reach the appropriate result. Realistically, however, it is unlikely for the equilibrium to exist at either extreme.¹⁸⁸

This mandatory negotiation and contract process should reveal individual privacy preferences and valuations better than alternative institutional options. While individuals certainly do not have perfect understandings of their own privacy preferences and valuations, the data suggests that individuals do have discrete and heterogeneous preferences.¹⁸⁹ Even if the contracting process does not perfectly value the individual executive's privacy preferences, it can track individual privacy preferences more closely than the alternatives: a court, legislature, or regulatory agency deciding or guessing how much the individual ought to or does value privacy.

In implementing this proposal, policymakers ought to consider whether to place any substantive constraints upon the mandatory contracting policy. One option would be for the law to impose no substantive restraints on the negotiation, and to let the parties develop any disclosure policy whatsoever. A slight variation on this option would be for the law to impose no additional constraints other than those already in existence for protection of certain groups such as pregnancy, race, disability, and age.¹⁹⁰

188. Cf. Schwartz, *supra* note 64, at 41 (In the context of consumer personal health information, "a socially optimal distribution of information is unlikely to exist at either extreme on the privacy/disclosure continuum.").

189. See *supra* Part II.

190. See, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2012); Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (2012) (protecting individuals from employment discrimination on the grounds of "race, color, religion, sex, or national origin"); Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 (2012). Current federal law has not been interpreted to protect against discrimination on the basis of sexual orientation. See, e.g., *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999). But see Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209 (2012) (arguing that this interpretation of the law is inconsistent with the courts' relational discrimination interpretation of other aspects of Title VII jurisprudence).

This proposal offers an improvement upon a pure contract regime that would use a traditional default rule, which the parties could then contract around. At the outset, it is hard for policymakers to determine the efficient default rule. Even if the efficient default could be determined, however, there are various reasons to believe that parties might find themselves stuck in a default and unable to contract around that default.¹⁹¹ First, under even the most traditional account, the drafting costs themselves may cause stickiness. Even putting aside the traditional transaction costs of the simple legal fees to draft the relevant provision, however, there are other possible reasons it may be difficult for the parties to opt out of the default rules. In the context of discussing some potential benefits of mandatory disclosure rules, Easterbrook and Fischel recognize that under a pure contract regime “no firm would have the appropriate incentives to create the [most effective] formula for disclosure” of this information in a way that allows shareholders to make useful comparisons.¹⁹² Additionally, Michael Klausner and Marcel Kahan have identified that when contracting against a background of default rules, network externalities cause the choice of one firm’s contract to affect the value of other firms’ contracts.¹⁹³ In other words, developing an entirely new disclosure policy from scratch may impose excessive transaction costs on the parties, which individually they might not undertake, absent the ability to coordinate in some way.¹⁹⁴ Given these network externalities and the existence of heterogeneous privacy preferences, faced with a default rule, corporations may suboptimally remain in the default policy because of an inability of those with nonmajoritarian privacy preferences to coordinate with others to efficiently design a different disclosure policy.¹⁹⁵ An additional concern is that given that corporate disclosure rules have historically been mandatory, a shift to a pure default regime may not suffice as accrued network benefits may have created a significant bias against opting out of a particular default.¹⁹⁶ This may be exacerbated by a signaling concern resulting from opting out of a default.¹⁹⁷ Under the signaling concern

191. See Omri Ben-Shahar & John A.E. Pottow, *On the Stickiness of Default Rules*, 33 FLA. ST. U. L. REV. 651 (2006) (surveying the various theories for why defaults may be sticky and claiming the problem is broader and more prevalent than recognized).

192. Easterbrook & Fischel, *supra* note 14, at 697.

193. See Michael Klausner, *Corporations, Corporate Law, and Networks of Contracts*, 81 VA. L. REV. 757, 775-84 (1995) (identifying such network externalities as judicial opinions interpreting contract terms, accumulation of business practices implementing the term, and the legal services required to adopt the term); see also Marcel Kahan & Michael Klausner, *Standardization and Innovation in Corporate Contracting* (or “*The Economics of Boilerplate*”), 83 VA. L. REV. 713, 734-36 (1997).

194. See Klausner, *supra* note 193.

195. *Id.* at 832.

196. Cf. *id.* at 830-31 (noting the potential for this problem in corporate law more generally).

197. See Lisa Bernstein, *Social Norms and Default Rules Analysis*, 3 S. CAL. INTERDISC. L.J. 59 (1993) (integrating default rules analysis and relational contract theory); Jason

idea, parties do not opt out even when they would otherwise do so, because of a concern that opting out from what is viewed as the “norm” (as communicated by the existence of the default itself) by proposing opt-out privacy policies “may in and of itself raise suspicion.”¹⁹⁸

Therefore, to address some of these challenges of a pure default system, this Article proposes that policymakers develop a menu of possible disclosure options for the parties to choose from.¹⁹⁹ A menu approach would help reduce transaction costs,²⁰⁰ and increase a standardized format that facilitates comparative use of what is disclosed.²⁰¹ The purpose of the menu would be to allow executives with heterogeneous privacy preferences to adopt disclosure policies tailored to their particular preferences²⁰² while allowing for network externalities among executives with similar preferences. A menu approach can also help reduce the possibility of locking in a sub-optimal equilibrium as menu options could be revised with time.²⁰³ This sort of menu contract would also help solve the problem of negative signals from opting out because under a menu, parties do not have the choice to remain silent.²⁰⁴ This sort of menu proposal is one example of what Cass Sunstein calls a regime of active choice in which individuals are forced to decide among various options because the contract cannot be silent with regard to a particular term.²⁰⁵

Scott Johnston, *Strategic Bargaining and the Economic Theory of Contract Default Rules*, 100 YALE L.J. 615 (1990) (showing that it is more difficult for parties to bargain around restrictive penalty default rules than around expansive default rules); Kathryn E. Spier, *Incomplete Contracts and Signalling*, 23 RAND J. ECON. 432 (1992) (showing that contractual incompleteness is driven by asymmetric information). See generally Ben-Shahar & Pottow, *supra* note 191.

198. Ben-Shahar & Pottow, *supra* note 191, at 662-63.

199. The use of legally-created contract menus to aid parties with contracting in light of various transaction costs was first developed in the bankruptcy context by Robert Rasmussen. Robert K. Rasmussen, *Debtor's Choice: A Menu Approach to Corporate Bankruptcy*, 71 TEX. L. REV. 51, 100-21 (1992). Other scholars subsequently extended this insight to other contexts. See, e.g., Ian Ayres, *Menus Matter*, 73 U. CHI. L. REV. 3 (2006); Ian Ayres & Robert Gertner, *Strategic Contractual Inefficiency and the Optimal Choice of Legal Rules*, 101 YALE L.J. 729, 739-41 (1992); Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1340-42 (2008); Klausner, *supra* note 193, at 839-41; Yair Listokin, *What Do Corporate Default Rules and Menus Do? An Empirical Examination*, 6 J. EMPIRICAL LEGAL STUD. 279 (2009).

200. Similar strategies have been proposed in other contexts. See Froomkin, *supra* note 69, at 1505 (noting that in the consumer context it can be helpful to lower the transaction costs of modifying standard form contracts to undercut challenges with contracting, given consumer behavior).

201. Cf. Rasmussen, *supra* note 199, at 66-67 (noting that a menu of options in the bankruptcy context helps make communication to third parties easier).

202. Cf. *id.* at 54 (noting that heterogeneity in firms suggests the use of a menu approach for bankruptcy).

203. Klausner, *supra* note 193, at 840.

204. See Ayres & Gertner, *supra* note 199, at 739 n.33.

205. Sunstein, *supra* note 94, at 21.

In developing the precise contours of the menu of options, policymakers must consider whether executives and shareholders are likely to want to treat disclosure of certain categories of information differently than other categories of information. In making these menu design choices, policymakers must balance having an optimal disclosure policy for executives with heterogeneous preferences among different dimensions, against the information costs of learning about different options. At some point, excessive options and choices reduce the usability both for the parties doing the contracting, and for the shareholders who need to use the disclosure policy.

One possible division worth consideration for inclusion on the menu is a distinction between disclosures of personal information exclusively about the executive, and disclosures that involve the privacy of a third party such as a spouse or child. Additionally, the corporation and executive by means of the menu contract may wish to reach different disclosure policies for all personal health information, all family-related information, and all other information. The menu should not go so far as to distinguish between very specific information, such as a policy agreement to disclose liver cancer, but not prostate cancer, as that level of detail is unlikely to be linked to different privacy preferences, but rather to knowledge of underlying information. Additionally, the contract may wish to distinguish between personal information that currently has an impact on the executive, and personal information that has some probability of having an impact on the executive in the future. Because the latter category involves various layers of probabilities, the menu options can usefully consider disclosure separately for each category. Finally, the contract should specify the detail of disclosure required. For example, a more privacy-protective policy may require that the corporation disclose the fact of impairment, but not the reason for the impairment. A more disclosure-leaning solution would also require disclosure of the reason for the impairment.

Overall, development of such a menu form would help the parties think through the different options that should be resolved by the disclosure policy. Parties would have the option to negotiate for no disclosure whatsoever for certain or all categories of personal information, for example, information involving third parties. These questions could be thought through systematically and incorporated into a relatively simple form that could help reduce transaction costs and avoid the need for the parties to think through all the options from scratch each time; by being forced to fill in the blanks, parties would actively negotiate for the privacy and disclosure preferences for various types of information. Regardless of the exact form of the negotiated contract, or the extent to which options are limited or infinite, the im-

portant new idea is that the executive would have the ability to reveal individualized privacy preferences in the course of those negotiations.²⁰⁶

The negotiation and contract process should take place at the beginning of the executive relationship in order to optimize the process.²⁰⁷ By negotiating and contracting for the privacy policy at the time of hiring or promotion to the executive position, the parties are already engaged in negotiations regarding various complex terms of employment.²⁰⁸ This further reduces the marginal transactional costs that results from contracting as compared to those for parties not already at the bargaining table. Furthermore, limiting the negotiation to the beginning of the relationship increases the probability that the executive is acting primarily based on knowledge of his or her overall privacy preferences, rather than knowledge of an existing personal fact, which the executive wishes to keep private. By having upfront negotiation and contracting it is still possible that a privacy-protective policy means that the executive has something to hide, but it is equally possible that it just means that the executive is a private person.²⁰⁹ Because shareholders cannot distinguish between the two options, there is a reduced concern of unraveling and the contract signaling to shareholders the very sort of information that the privacy-disclosure policy is designed to keep private.²¹⁰

Relatedly, corporations and executives should not be permitted to renegotiate the disclosure policy on an ad hoc basis. For example, if

206. See Murphy, *supra* note 62, at 2393 (“In the absence of contract, [a privacy] preference is often difficult to determine.”).

207. As with other types of disclosure, the timing of the actual disclosure should also be carefully considered in order to minimize strategic timing of disclosures to maximize performance-based compensation. See Charles M. Yablon & Jennifer Hill, *Timing Corporate Disclosures to Maximize Performance-Based Remuneration: A Case of Misaligned Incentives?*, 35 WAKE FOREST L. REV. 83, 87-88 (2000) (explaining that managers’ traditional discretion over the timing of corporate disclosures allows them to maximize their own performance-based compensation).

208. See Omari Scott Simmons, *Taking the Blue Pill: The Imponderable Impact of Executive Compensation Reform*, 62 SMU L. REV. 299, 310-11 (2009) (describing the executive pay decision as part of the decision to hire a CEO, in which boards choose between various candidates with varying traits and competencies and negotiate on complicated aspects of executive compensation).

209. See DOUGLAS G. BAIRD, ROBERT H. GERTNER & RANDAL C. PICKER, *GAME THEORY AND THE LAW* 95 (1994) (“Unraveling may not occur (or will not be complete) if there is a chance that a player has never acquired the relevant information. In such a case, one will not be able to tell whether players are silent because they do not have the relevant information or because they have the information but do not wish to reveal it.”).

210. See Scott R. Peppet, *Unraveling Privacy: The Personal Prospectus and the Threat of a Full-Disclosure Future*, 105 NW. U. L. REV. 1153, 1195 (2011) (noting that economic theory cannot predict the point at which privacy’s unraveling may be less than complete, but “in some instances the equilibrium may allow some market participants with less than ideal information to keep that information private”); see also Verrechia, *supra* note 12, at 142 (noting that uncertainty may be a rationale for the withholding of information because there is the possibility that the information is bad, or because the information in question has yet to arrive).

the executive and corporation were permitted to spontaneously renegotiate for a more privacy-protective policy, then shareholders would immediately assume that the policy change means that the executive has something to hide.²¹¹ This would undermine the very purpose of negotiating for a disclosure policy.

On the other hand, policymakers may wish to consider permitting renegotiation of the disclosure policy at a pre-determined interval. Just as in the health insurance context, in which individuals are permitted to change their insurance levels during a pre-determined open enrollment window, a similar option may be possible, for example allowing for renegotiation after five or ten years. This can help address the problem that individual privacy preferences may change over time.²¹² Borrowing further from the insurance context, perhaps a pre-existing condition type of model can help avoid the concern that what is actually being protected in the revised policy is a new personal problem rather than new privacy preferences. For example, an executive who has gone through a particular health challenge may realize that as a result his or her privacy preferences have shifted in favor of privacy. Therefore, when the “open enrollment” window comes along, the executive wishes to amend the disclosure policy in favor of disclosing less private information. The pre-existing condition idea would mean that the executive’s existing health condition, or directly related conditions would continue to be disclosed under the former policy, but new and unrelated information could be disclosed at the reduced level in the new policy.

Policymakers must also decide which set of executives would negotiate a disclosure policy with the corporation. The most straightforward possibility is to limit the regime to the chief executive officer. This would be the most easy to administer, as each corporation would

211. This is a version of the game-theoretic unraveling effect, which posits that “[i]n a world of verifiable information and low-cost signaling,” self-interested actors will be forced to disclose fully their personal information for economic gain, and those who refuse to do so “are assumed to be withholding negative information and therefore stigmatized and penalized.” Peppet, *supra* note 210, at 1156; see also BAIRD, GERTNER & PICKER, *supra* note 209, at 95-98; Richard A. Posner, *Privacy*, in 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 103, 107 (Peter Newman ed., 1998).

212. Whether individual privacy preferences actually do change over time is an empirical question worth exploring further. See Lee Anne Fennell, *Revealing Options*, 118 HARV. L. REV. 1399, 1454 (2005) (recognizing the policy challenges posed because people’s preferences may change over time); see also Sunstein, *supra* note 94, at 23 (pointing out that individual preferences may vary from year to year). I agree with Lior Strahilevitz and Ariel Porat’s intuition that at least with regard to privacy preferences, these sorts of values tend to be largely stable once people reach adulthood as they are largely driven by personality characteristics and values. See Ariel Porat & Lior Jacob Strahilevitz, *Personalizing Default Rules and Disclosure with Big Data* 42 (Coase-Sandor Inst. for Law & Econ., Working Paper No. 634 (2d Series), 2013). Nonetheless, like Strahilevitz and Porat, this proposal recognizes that people sometimes do change in ways that can shift their privacy preferences and allows for some accommodation of that possibility. See *id.*

only have to engage in a single negotiation, and shareholders would only have to keep track of a single policy. On the other hand, limiting the proposal to the CEO means that other high-level executives would not be able to negotiate for disclosure policies that adequately reflect their own privacy preferences.

An alternative option is to develop a definition of a covered person based on such considerations as indispensability to the company. For example, one practitioner proposes defining the covered person as a director of, employee of or independent contractor retained by the [corporation] who performs functions on behalf of or for the [corporation] that are not, at the time of the [disclosure decision], provided to the [corporation] by any other person, are fundamental to the financial performance of the [corporation] and, in the good faith judgment of the [corporation], could not be performed by anyone currently employed by or retained by the [corporation].²¹³

This particular language was designed as “deliberately narrow” and covers very few executives, but a different definition could be drafted, which covers more executives.

The Article proposes a possible alternative that builds upon features of the existing disclosure regime. The law already requires that corporations provide its shareholders with full compensation information for the CEO and the four most highly compensated executive officers by means of a summary compensation table.²¹⁴ Therefore, in a world in which that sort of disclosure already exists, extending the negotiation and contract process to that same set of executives makes sense to the extent that executive compensation can be viewed as a general approximation for how vital that executive is to the corporation, and therefore a decent proxy for the set of executives for whom shareholders have a legitimate disclosure interest. This also makes sense conceptually to the extent that the privacy-disclosure policy can be viewed as a piece of the compensation puzzle, as corporations may have to increase compensation to the executive if they wish to decrease the amount of privacy maintained by the executive and vice versa. Therefore, the entire picture of compensation can be presented if the negotiation and contract is limited to those executives for whom full compensation disclosure is already provided to shareholders.

B. Revealing Disclosure Preferences via Disclosure

The second step of the proposal would require the corporation to disclose the precise disclosure policy agreed upon with the executive to its shareholders. This necessarily means that while the precise process of the negotiation would not be proscribed by the law, the

213. Horwich, *supra* note 11, at 868.

214. 17 C.F.R. § 229.402 (2012).

law would mandate the existence of the final product from that process—namely, the disclosure policy itself.

Disclosing the disclosure policy to the shareholders helps keep the interest of the corporation and the interests of the shareholders more closely aligned with regard to the shareholders' preferences for disclosure, in order to help avoid a possible agency problem. It is true that alignment is not perfect, given that shareholders do not negotiate directly with the executive, but the corporation is more likely to align its bargaining position over time with the shareholders if it is required to disclose the agreed-upon policy to the shareholders. If the corporation fails to properly represent the shareholders position with regard to disclosure, then the shareholders can move their capital to a corporation that more accurately reflects their disclosure desires and views. For example, suppose that a particular executive and corporation bargain for a privacy policy that is fairly protective of privacy. The policy states that the corporation will not disclose personal information about the executive unless it is currently substantially impacting his or her ability to do his or her job, and even then will only disclose the fact of the situation, not the underlying personal facts. The corporation will then have to disclose this nondisclosure policy to its shareholders. If this minimal disclosure is not satisfactory to shareholders, then the market should respond by lowering the price of the corporation's stock in response to such a policy. In the long run then, the market will help inform and measure the strength of shareholder preferences for disclosure.

In addition to revealing shareholder disclosure preferences, disclosing the nondisclosure policy to the shareholders helps clarify the expectations of everyone involved regarding the circumstances under which disclosure will occur. Under the current system, shareholders do not know when and under what circumstances corporations will disclose information about executives to the shareholders. Additional clarity on this front helps with decisionmaking for everyone involved.

This second step also provides the second half of the insurance that corporations abide by the disclosed disclosure policy by taking advantage of the litigious nature of American society. Thinking about the example of Steve Jobs, if Steve Jobs and Apple had negotiated at the outset for a particular disclosure policy, then all parties involved would have had clear expectations regarding what would need to be disclosed. Shareholders would have known that Apple would either never disclose personal information about Jobs, would always disclose personal information about Jobs, or would disclose personal information about Jobs only given certain contractually-identified circumstances. If Apple had disclosed information about Jobs that it had contractually promised not to disclose, then Jobs himself would have had a cause of action. Suppose on the other hand (as in fact was

the case) that Apple did not disclose any of the health issues that Jobs was having until the very end when it was revealed that he was terminally ill with cancer. The question from the perspective of the shareholder would be whether that disclosure was consistent with Apple's declared disclosure policy. If Apple's behavior was inconsistent with a good faith compliance with the disclosure policy, then it would be fairly straightforward for a shareholder to bring such a suit. This is only possible, however, by mandating disclosure of the disclosure policy and giving the shareholders a clear expectation of disclosure and a correlated cause of action. It might also make sense to give the SEC the power to bring a case for violation of a disclosed nondisclosure policy in order to increase pressure on corporations to abide by the agreed-upon policies.

Scholars have also recognized that disclosure fails if the target of the disclosure cannot understand or process the information.²¹⁵ The menu approach proposed above to help facilitate contracting can also help with usability/readability. At a minimum, by implementing a standard format and common vocabulary across different disclosure policies, such menu contracts would allow shareholders to do direct comparison of various corporate disclosure policies.²¹⁶ Similarly, the actual language of the menu options can be designed to maximize completeness of disclosure as well as comprehensibility by the shareholders. Additionally, all of this information could be presented on the summary compensation table, which currently serves as a single location where all top executive compensation is presented. At the bottom of each column of information for a particular executive, corporations could include electronic links or simple attachments to the executive's summary compensation information.

In the long run, it would then be possible to design easy software tools to help shareholders search for corporations that meet their minimal requirements. For example, a shareholder could communicate to his or her broker, or via software, that he or she is only willing to purchase a stock with a certain minimum level of disclosure across the various categories. This would prevent the need for shareholders to always read the actual nondisclosure policy, while still accomplishing the goal of having shareholders' preferences reflected in

215. See Omri Ben-Shahar & Carl E. Schneider, *The Failure of Mandated Disclosure*, 159 U. PA. L. REV. 647, 650-51, 711 (2011).

216. See Xinguang Sheng & Lorrie Faith Cranor, *An Evaluation of the Effect of US Financial Privacy Legislation Through the Analysis of Privacy Policies*, 2 ISJLP 943, 975 (2006) (noting that the Gramm-Leach Bliley Act requirement that financial institutions provide notice of privacy policies to customers has resulted in helpful standard format and common vocabulary, while recognizing its many failures); see also Easterbrook & Fischel, *supra* note 14, at 700-01 (noting the one of the primary benefits of mandatory disclosure is the use of a standard format and time of disclosure, which increases the comparative value of what is disclosed and reduces the costs of disclosure).

the policies. At the same time the menu contract would be relatively straightforward and would not resemble the sort of lengthy legalese privacy policies that consumers receive and disregard all the time,²¹⁷ such that a shareholder who did choose to read the policy should be able to understand it with relative ease.

C. Potential Secondary Benefits

Furthermore, it is possible that this entire regime would not only better reflect existing privacy and disclosure preferences, but could also change social behavior regarding privacy. In advocating for a contractual approach to online interpersonal privacy, Patricia Sánchez Abril notes that the contractual system could allow individuals to communicate expectations of privacy to each other and potentially “recontextualiz[e] the online social space as one where people [have the option to] value privacy.”²¹⁸ Abril views contract as having the power to both express and create social norms and to combat the “anything goes” environment that generally exists when it comes to privacy.²¹⁹ If Abril is correct, then allowing individual executives to negotiate for privacy-disclosure policies can create a social norm in which it is acceptable to maintain some aspects of one’s life private even if one chooses to be a corporate executive.²²⁰

This ability to contract for increased privacy, and the shift in norms that may accompany it, could have a beneficial impact on the prevalence of women and minorities in corporate positions. It is widely recognized that women and minorities are underrepresented as executives of publically traded corporations.²²¹ A wide variety of

217. See Sheng & Cranor, *supra* note 216, at 962 (explaining that financial institution privacy policies are easier to read post-Gramm-Leach Bliley Act, but remain difficult to comprehend).

218. Abril, *supra* note 71, at 694.

219. *Id.* at 689, 719.

220. A shift in norms may also reduce a potential unraveling effect. See Peppet, *supra* note 210, at 1196 (“To the extent that informal norms develop against disclosure, privacy may not unravel completely.”).

221. The Department of Labor’s Glass Ceiling Commission of 1991 found that women accounted for only 6.6% of executives and minorities only 2.6%. See U.S. DEP’T OF LABOR, A REPORT ON THE GLASS CEILING INITIATIVE 6 (1991). Although those numbers have improved somewhat over the years, women still hold only 3% of top officer posts (CEO, COO, President, Chair, Vice Chair, and Executive Vice President), those positions that are most likely to have a privacy impact, and in 2002, only 1.8% of CEOs of Fortune 500 companies were women. See David Benjamin Oppenheimer, *Understanding Affirmative Action*, 23 HASTINGS CONST. L.Q. 921, 966-67 (1996) (stating that white men occupied 97% of top management positions in America’s 1500 largest companies); see also *Women in Business: Helping Women Get to the Top*, ECONOMIST (July 21, 2005), <http://www.economist.com/node/4198363> (noting that while women account for nearly half of the global work force, they account for very few positions in senior management at large corporations; “For every ten men in the executive suite there is one woman, a ratio that has changed little since the term ‘the glass ceiling’ was coined two decades ago to describe the barrier that allows women to see the top of the corporate ladder, but seems to stop them from reaching it. Despite much discussion,

theories have been offered to help explain this continued glass ceiling, and undoubtedly there are a number of complex factors at play.²²² One possibility worth exploring in future work is whether privacy preferences play a role in this disparity. There are some reasons to believe that women and minorities may be more privacy-protective than white men.²²³ Perhaps, then, among the complex factors involved in a world in which executives cannot contract for privacy and the ability to guarantee individual privacy is uncertain, women and minorities are less likely to pursue the top-level corporate positions, in which their privacy is likely to be compromised. Although this remains speculative, the impact of privacy concerns on women and minorities' abilities to reach top executive positions is worth further consideration.

D. Comparisons with a Sorting Regime

A contract-based regime like the one proposed necessarily has transaction costs associated with the contracting process itself. Although the contractual menu design of the proposal deliberately seeks to minimize those contracting costs, they cannot be eliminated entirely.

In other contexts in which there are heterogeneous preferences, the conventional response is to suggest that individuals sort themselves based on their heterogeneous preferences.²²⁴ Therefore, it is worth considering whether a similar sorting regime might make sense for the heterogeneous privacy preferences faced by corporations for their executives. It might be possible to design a system in which corporations would unilaterally decide on their disclosure policies. Executives could then sort themselves into the corporation whose disclosure policy best fits their privacy preferences.

Although such a regime is possible, as with any sorting solution,²²⁵ it too would have associated costs. First of all, there are reasons to be particularly concerned as to whether sorting would work efficiently

and efforts by both women's and business groups to break that barrier down, the world's biggest companies are still almost exclusively run by men . . ."). The picture is even bleaker for minorities. See Oppenheimer, *supra*, at 967-68.

222. See, e.g., Diane L. Bridge, *The Glass Ceiling and Sexual Stereotyping: Historical and Legal Perspectives of Women in the Workplace*, 4 VA. J. SOC. POL'Y & L. 581 (1997) (focusing on the challenges that the corporate glass ceiling raises for women in the workplace).

223. See generally Mary J. Culnan & Pamela K. Armstrong, *Information Privacy Concerns, Procedural Fairness, and Impersonal Trust: An Empirical Investigation*, 10 ORG. SCI. 104, 110 (1999) (noting that some surveys indicate that less dominant groups, such as minorities and women, may have the greatest privacy concerns).

224. See, e.g., RICHARD A. MUSGRAVE, *FISCAL SYSTEMS* 299 (1969) (suggesting that "it is efficient for people with similar tastes in social goods to reside together"); see also Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 422 (1956) (making a similar point for public goods).

225. See Fennel, *supra* note 212, at 1455-56 (recognizing the limits and concerns presented by sorting in the housing context).

in the market for corporate executives. Unlike housing, in which there are generally properties available in different neighborhoods at any given moment, high-level executive positions are extremely rare, especially at a given moment. Therefore, even if they desired to do so, executives might not be able to sort among corporations with various disclosure policies, but would often be faced with an all-or-nothing proposition. Second, as with other complex decisions,²²⁶ executives make decisions based on a multitude of factors, such that privacy would be bundled with numerous other relevant considerations. This would also limit the ability of executives to adequately sort based on privacy preferences.

Finally, there might be additional costs associated with such sorting even if it did occur. For example, a lower-level executive with experience in a particular company might otherwise be promoted within that corporation to a high-level executive position (sufficiently high to necessitate disclosure). If that executive's privacy preferences did not match that corporation's disclosure policy, the executive might be forced to sort away to a different corporation, even though the executive's institutional knowledge would mean it would ordinarily be more efficient for the executive to remain within the original company. A contract-based solution would allow the corporation to retain that executive by negotiating an individualized disclosure policy.

IV. APPLICABILITY OF THE PROPOSAL

Allowing corporations and executives to contract for a tailored nondisclosure policy in combination with mandating disclosure of that nondisclosure policy would better address the privacy-disclosure balancing problem than traditional legal solutions. This section anticipates questions regarding the extent to which this conclusion is generalizable to other related situations, and considers the circumstances under which disclosure of nondisclosure policies might work as a feasible substitute for disclosure of underlying facts.

Although similar privacy-disclosure problems occur in many contexts, at the outset, contracting only makes sense when both parties have sufficient bargaining power to believe that the contract can adequately reflect the interests of both parties. Therefore, unlike corporate executives, a similar model would likely not make sense in an ordinary employment contract for ordinary employees who lack such bargaining power. Furthermore, contracting only makes sense where there is a market with sophisticated parties who can act on the disclosed disclosure policies. In the context of corporate executives, institutional investors and other sophisticated shareholders play that role, leading to a closer approximation of an efficient market assumption.

226. See *id.* at 1456 (making this point for the decision to buy a home).

In other contexts where this sort of problem arises, such as a few mentioned below, other types of solutions need to be developed.

A. *Distinguishing the Consumer Context*

The idea of using disclosure of disclosure policies does exist in other areas involving privacy problems, although in a very different way. For example, Michael Froomkin proposes that “all sites that collect personal data [be] required to disclose what they collect and what they do with it.”²²⁷ This is the inverse of the proposal presented in this Article. In Froomkin’s scenario, the question being answered by the disclosure policy is what information will be collected and when that information will be disclosed to others, where such disclosure is mostly bad from the consumer’s perspective. In the scenario here, the point of disclosure of the disclosure policy is actually disclosure of non-disclosure—or informing shareholders what information will not be disclosed where disclosure is viewed as largely positive from the shareholders’ perspective. Despite these differences, both ideas use similar mechanisms combining legislation, market forces, and the litigiousness of Americans to attempt to strike a proper balance by making it an actionable offense to violate a posted privacy/disclosure policy.²²⁸

Furthermore, there are reasons to believe that disclosure of the applicable disclosure policy may work better in the corporate executive disclosure scenario than in the consumer context.²²⁹ There are concerns with allowing individual consumers to negotiate the level of privacy or disclosure that they desire due to various market imperfections.²³⁰ Many of these concerns, however, do not apply to negotiations between sophisticated executives and corporations. Two of the main concerns with relying upon a privacy market in the consumer context—lack of bargaining power and lack of privity of contract—have been eliminated in the executive context. Unlike consumers or ordinary employees, executives typically have plenty of bargaining power and leverage, and are therefore in a position to fairly contract for their desired terms. Additionally, the corporations and executives are

227. Froomkin, *supra* note 69, at 1528.

228. *See id.*

229. Even in the consumer context, proponents of contracting for privacy models contend that computer technology will allow individuals to delegate individualized negotiations over disclosure and use of personal information to intelligent software agents. *See, e.g.,* Lawrence Lessig, *The Architecture of Privacy*, 1 VAND. J. ENT. L. & PRAC. 56, 64 (1999) (describing P3P, “a standard for negotiating protocols on the web,” which could decide whether a particular website’s privacy practices match the user’s preferences). *But see* Jessica Litman, *Information Privacy/Information Property*, 52 STAN. L. REV. 1283, 1294-01 (2000) (expressing concern with such solutions).

230. *See* Schwartz, *supra* note 64, at 41 (noting that various market imperfections caution against simply letting individuals negotiate the level of privacy or disclosure that they desire in the context of consumer personal health care data).

already at the bargaining table negotiating various aspects of the employment arrangement, so there is no concern with a lack of privity.

There is also a concern in the consumer context with the lack of knowledge on the part of consumers regarding the treatment of personal data. For example, in the medical privacy context, Paul Schwartz notes that there are three factors contributing to the failure of the privacy market: (1) lack of knowledge regarding the treatment of personal data; (2) an agency problem; and (3) a collective action problem.²³¹ The lack-of-knowledge concern would be ameliorated in the executive context by using the very requirement of negotiating for a disclosure policy as a means of making executives fully aware of the possibility of disclosure of their personal information. As opposed to the shallow consent process in the medical context, which relies on blanket patient release forms,²³² the proposal here requires active negotiation of an individualized policy, therefore raising issues of awareness, informed consent, and possible compensation for disclosure of personal information.²³³

With regard to the potential agency problem identified by Schwartz in the medical context, here too the shareholders' disclosure interest is imperfectly represented by the corporation at the negotiation table.²³⁴ The disclosure of the nondisclosure policy is an attempt to minimize the agency problem by providing a mechanism to hold corporations accountable to the extent that disclosure policies vastly diverge from the shareholder preferences.

Finally, in the consumer context there is a collective action problem because "[a]s members of large consumer blocks, individuals may have difficulty finding effective ways to express collectively their relative preferences for privacy."²³⁵ The solution offered here is precisely designed to help executives express their respective privacy preferences relatively cheaply, which is made possible by the fact that the parties already have contractual privity. Therefore, many of the concerns in the consumer context with contracting for and adopting a disclosure of the relevant disclosure policies can be avoided in the corporate executive context.

B. Distinguishing the Political Context

Perhaps the most obvious contender for an analogous situation is the question of how to treat the disclosure of private information

231. *Id.* at 47.

232. *See id.* at 49.

233. *See also* Ben-Shahar & Schneider, *supra* note 215, at 667-79 (describing the challenges with uninformed consent to disclosure).

234. *See* Schwartz, *supra* note 64, at 50 (describing the agency problem in the health context due to a conflict of interest between the employer and the employee).

235. *Id.*

about political candidates and elected officials.²³⁶ Currently no law requires political candidates or elected officials to disclose information about their health.²³⁷ Many candidates do decide to voluntarily release information about their physical health, although others have outright lied about their health status.²³⁸ There are, however, state and federal election commission rules that require candidates for office to make various types of financial disclosures.²³⁹

Numerous similarities exist between the political disclosure context and the executive disclosure context. Just as shareholders have a legitimate interest in knowing information that could impact the performance of corporate executives, voters and citizens have a legitimate interest in knowing information that could impact the performance of elected officials.²⁴⁰ Additionally, both executives and political candidates necessarily give up some rights to privacy as a result of their decision to pursue their careers of choice, although certainly neither group entirely gives up all privacy rights.²⁴¹ Similarly, there have been concerns expressed that a perceived lack of strong candidates for elected office is a direct result of the invasion of privacy that comes along with running for office.²⁴² Scholars have recognized that increasing the potential for maintaining some privacy would mitigate these high costs of running for public office, resulting in an increase in the pool of qualified candidates, and perhaps also a higher degree of excellence in government.²⁴³ In other words, there is a concern that if privacy preferences are heterogeneous, that limitation of the pool of politicians to those with very low privacy preferences impacts the quality of candidates.

236. See Teneille R. Brown, *Double Helix, Double Standards: Private Matters and Public People*, 11 J. HEALTH CARE L. & POL'Y 295 (2008) (looking at disclosure of a presidential candidate's health information through the lens of disclosure of genetic testing results); René Reyes, *Do Even Presidents Have Private Lives?*, 17 KAN. J.L. & PUB. POL'Y 477 (2008) (arguing for a limited executive privacy independent of executive privilege).

237. Brown, *supra* note 236, at 304.

238. *Id.*

239. *Id.* at 332-35.

240. *Id.* at 298 (noting that Americans deserve information to help them determine if political candidates "are up for the enormous challenges and responsibilities" of elected office).

241. See *Chandler v. Miller*, 520 U.S. 305, 321 (1997) (holding that a Georgia state law that required candidates for high public office to pass a drug test was unconstitutional, but exposing reduced privacy expectations of candidates for public office).

242. See Reyes, *supra* note 236, at 481 (pointing out that qualified individuals may be unwilling to face the loss of privacy and the sense of personhood and freedom that comes from privacy that is lost when running for government office, regardless of whether they have damaging or embarrassing facts to hide).

243. *Id.*; Ruth Gavison, *Privacy and the Limits of Law*, 89 YALE L.J. 421, 456 (1980). But see Alan Rubel, *Claims to Privacy and the Distributed Value View*, 44 SAN DIEGO L. REV. 921, 928-29 (2007) (recognizing the potential legitimacy of the argument that lack of privacy may decrease the pool of people from which officials are drawn, thus decreasing opportunities for good governance, but concluding that the goal of having the best qualified people hold office is outweighed by other justifications for democratic processes, including obtaining the consent of the governed, which requires access to information).

Furthermore, in a world in which the government and its elected officials increasingly make policies about the privacy of ordinary citizens, there may be a social harm to the privacy of all individuals that occurs when politicians are limited to the portion of the population who do not highly value privacy. Similar to the concern about corporate executives, who also make a good deal of privacy policy,²⁴⁴ having elected officials solely from a self-selected pool of low-privacy individuals may result in a lesser priority on privacy in general, as a result of a lack of understanding of “what the privacy fuss is all about.”²⁴⁵

Despite all of these similarities in the problem, key differences prevent any recommended applicability of the solution proposed above to candidates for elected office. The political context is missing some notable features necessary to make the solution work in the corporate context. One major difference is that the disclosure of personal information that could impact the performance of elected officials is more important during the campaign, when voters need to make an informed decision, than during the term of office itself. Unlike shareholders, who can continue to buy and sell stock at any time and therefore need continuous information, voters do not continuously vote on the performance of elected officials outside of the context of elections. This suggests that the timing of the solution needs to be different, and the treatment of personal information about candidates for office (some of whom may currently be in office) should be different from personal information about already-elected officials.

A corollary of this difference is that the mechanisms involved in getting candidates elected greatly differ from the mechanisms involved in hiring an executive. Most importantly, there is no immediate parallel to the negotiation process in which the executive and corporation negotiate over various aspects of compensation. Instead, candidates for elected office run for office knowing in advance the terms of the job for which they are running. The details of that job are non-negotiable. Furthermore, much of the disclosure of information results from media scrutiny and the unraveling effects of disclosure by other candidates, rather than any legal requirement for disclosure. For example, during the 2012 U.S. presidential election Mitt Romney found himself forced to reveal some aspects of his tax returns after repeated calls by other candidates for him to do so.²⁴⁶

244. See *supra* Part II.C.3.

245. See Westin, *supra* note 10 (explaining that the 20% of the population falling within the privacy unconcerned group fails to recognize “what the ‘privacy fuss’ is all about”). This theme of the societal implications of having both corporate executives and politicians drawn from a privacy-unconcerned subset of the population will be explored further in future scholarship.

246. See Todd Wallack, *Romney’s Tax Returns Show Income of \$20.9m Last Year*, BOSTON GLOBE (Jan. 24, 2012), <http://www.bostonglobe.com/news/nation/2012/01/24/mitt-romney-earned-million/mN98vq9Z9xJlCCj8Pl6xHN/story.html>.

In view of these differences, any attempt to draw lessons from the executive and privacy balancing solution offered in this Article must properly take into account the particular challenges of the political context. This is not a one-size-fits-all proposal. The proposal presented in this Article offers one way of addressing one particular incarnation of a privacy-disclosure problem by taking advantage of features of the corporate disclosure system: (1) sophisticated parties who can engage in informed contract negotiation; (2) existing sophisticated investors who have the time and resources to update the market in light of new information; (3) mechanisms and institutions for pricing complex information; and (4) empowered shareholders who have proven themselves willing to sue in order to enforce the disclosure system. Any similar proposal in the political context would have to take advantage of existing institutions in the political realm, which are very different from the institutions and mechanisms in the corporate context. For example, rather than mandating some sort of specific regulated disclosure before a candidate could receive federal matching funds for his or her campaign, as others have proposed,²⁴⁷ the law could mandate that candidates disclose their nondisclosure policy in order to receive federal matching funds for the campaign. Then if the candidate failed to disclose promised information, or, more importantly, flat out lied about promised information, the remedy would be that the candidate be forced to return those funds, which were conditioned on good faith compliance with an agreed-to disclosure policy. It is true that the increased likelihood of an unraveling effect in the politician arena might require high levels of disclosure; however, at the very least this would create certainty for everyone involved with regard to disclosure, and offer a remedy in response to the clear problem of candidates lying about information. Furthermore, this system would allow candidates to agree to protect the privacy of children or other family members, as there might be wider agreement that the children did not choose to enter the public sphere. Alternatively, policymakers could consider leveraging the political party system and the possibility of contracts with those parties to create the sort of balance of privacy and disclosure made possible in the executive context by virtue of the contract relationship.

V. CONCLUSION

This Article has suggested that new solutions are needed for the disclosure of personal information about corporate executives. The status quo lacks clarity, fails to account for both privacy and disclosure interests, and removes the possibility for executives to opt

247. See Brown, *supra* note 236, at 361.

out of the regime to tailor a disclosure policy that better fits their privacy preferences.

As one possible solution for addressing the competing interests of privacy and disclosure, policymakers should supply menus of optional disclosure policies. Executives and corporations should contract for the particular disclosure policy that would apply to that executive's personal information. The corporation should then be required to disclose the disclosure policy to the shareholders. This combination would improve upon the status quo by increasing clarity, while allowing for differences in policies that can reflect heterogeneity in executive privacy preferences.

Returning for illustrative purposes to the most salient example of the problem, despite his notoriety, by all accounts Steve Jobs was an extremely private individual even prior to his diagnosis. Consequently, under the proposed disclosure-of-disclosure-policies regime, Jobs would likely have contracted for a disclosure policy that would have protected a fair amount of his personal information from disclosure. Thus, when he became sick, Apple would not have needed to agonize over whether to disclose his information. It could have consulted the applicable disclosure policy as to whether health information about Jobs needed to be disclosed. Similarly, shareholders would have already known that Jobs had a disclosure policy in which certain types of information would not be disclosed. All parties would have had far clearer expectations, and Jobs' privacy preferences could have been accommodated. This illustrates the way the proposed solution should work not only for Jobs, but also for less famous executives and corporations facing the privacy-disclosure problem.

